Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

LEON GARMON,

Petitioner,

versus

THE ALABAMA STATE BAR,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER THE DISCIPLINARY BOARD OF THE ALABAMA STATE BAR PREDICATED ITS FINDINGS OF GUILTY, AND IMPOSED PUNISHMENT THEREON, ON PERCEIVED UNCHARGED MISCONDUCT, AGAINST WHICH UNCHARGED MISCONDUCT MR. GARMON WAS NOT CALLED UPON TO DEFEND AND WHICH WAS IMPROPERLY AND UNFAIRLY PRESENTED TO THE DISCIPLINARY BOARD BY THE ALABAMA STATE BAR'S GENERAL COUNSEL AND WHICH WAS UNFAIRLY CONSIDERED BY THE DISCIPLINARY BOARD.

II.

WHETHER CHANGES IN THE COMPOSITION OF THE DISCIPLINARY BOARD PANEL HEARING THE CHARGES AGAINST MR. GARMON OCCURRING AFTER THE PANEL BEGAN HEARING EVIDENCE *ORE TENUS*, PARTICULARLY THE ABSENCE OF COMMISSIONER OLIVER, WHICH CHANGES WERE NOT CONSENTED TO BY MR. GARMON AND TO WHICH HE PROPERLY OBJECTED, TAINTED THE PROCEEDINGS IN THESE CASES TO SUCH A DEGREE AS TO VIOLATE MR. GARMON'S RIGHTS TO DUE PROCESS AND A FAIR HEARING.

QUESTIONS PRESENTED – Continued

III.

WHETHER THE PUNISHMENT IMPOSED BY THE DISCIPLINARY BOARD OF THE ALABAMA STATE BAR IN THESE CASES IS DISPROPORTIONATE TO THE OFFENSES COMMITTED AND THE LENGTH OF THE ORDERED SUSPENSIONS INDICATES THE DISCIPLINARY BOARD IMPROPERLY CONSIDERED PRIOR NON-FINAL DISCIPLINE IMPOSED AGAINST MR. GARMON IN DETERMINING THE PUNISHMENT IN THESE CASES, ALL CONTRARY TO MR. GARMON'S DUE PROCESS AND EQUAL PROTECTION RIGHTS AS WELL AS HIS RIGHT TO BE PROTECTED AGAINST CRUEL AND UNUSUAL PUNISHMENT.

LIST OF PARTIES

All parties to this case are listed in the caption. The Alabama State Bar is a creation of the Legislature of Alabama, *Ala. Code* [sec.] 34-3-40,[1] *et seq.* (creating the Board of Commissioners of the Alabama State Bar), and its actions in this case are taken by and under the authority and law of the State of Alabama. *Ala. Code* [secs.] 34-3-80, 34-3-81. Thus, 28 U.S.C. [sec.] 2403(b) may be involved and the Attorney General of Alabama, while not a party to this case, has been served with this petition as required by Rule 29.4(c) of the Rules of this Court.

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[1] Unless otherwise noted, citations to the statutory law of Alabama are to the *Code of Alabama (1975)*, as amended, adopted as the official codification of the acts of the Alabama Legislature on February 17, 1977, by Act No. 20, Alabama Acts, Regular Session 1977.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

DECISIONS BELOW

The decision of the Supreme Court of Alabama affirming the findings of guilty and punishment imposed upon Leon Garmon by the Disciplinary Board of the Alabama State Bar in ASB-89-099(A), ASB-89-173 and ASB-89-341, entered by order and without opinion on August 5, 1994, has not been published in the official reporter of that court but is reproduced in the appendix to this petition. (App. A-1). The decision of the Supreme Court of Alabama overruling, without comment or opinion, petitioner's application for rehearing in ASB-89-099(A), ASB-89-173 and ASB-89-341, dated October 28, 1994, has not been published but is also reproduced in the appendix to this petition. (App. C-1). The order of the Disciplinary Board of the Alabama State Bar promulgating the findings of guilty in ASB-89-099(A), ASB-89-173 and ASB-89-341 and imposing suspensions from the practice of law for periods of 90 days, 180 days and 180 days, respectively, against petitioner as discipline on those findings of guilty, dated July 2, 1993, has not been published but is reproduced in the appendix to this petition. (App. B-1-8). The Disciplinary Board's orders of August 16, 1994, denying Mr. Garmon's post-judgment motions challenging the findings of guilty in ASB-89-099(A), ASB-89-173 and ASB-89-341 are included in the appendix. (App. B-1-8, respectively). The denial of Mr. Garmon's post-judgment motions challenging the findings of guilty and the order of discipline formed the basis of petitioner's appeal to the Alabama Supreme Court and this petition for certiorari. Mr. Garmon filed a motion to vacate November 14, 1994. (App. E-1-13) Mr. Garmon filed an amendment to the motion to vacate on December 5, 1994. (App. E-14-50)

JURISDICTION

The appellate jurisdiction of this Court under 28 U.S.C. [Sec.] 1257(3) is invoked in this case. The Alabama Supreme

Court's decision (App. A-1) and October 28, 1994, order overruling petitioner's application for rehearing (App. C-1) necessarily denied petitioner's First, Sixth, Eighth and Fourteenth Amendment challenges to the findings of guilty in the underlying attorney disciplinary proceedings. The question of whether the findings of guilty in the instant attorney disciplinary proceedings amount to an impermissible infringement and violation of petitioner's federal constitutional rights under the First, Sixth, Eighth and Fourteenth Amendments was presented to both the Disciplinary Board of the Alabama State Bar and the Supreme Court of Alabama, and the decisions of the Supreme Court of Alabama on that question are properly reviewable by this Court on certiorari.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The involved provisions of the United States Constitution and the Code of Professional Responsibility of the Alabama State Bar including the First, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article I, Section 10 and 11 of the Alabama State Constitution; Disciplinary Rule DR-1-102(A)(4), DR-1-102(A)(5), DR-1-102(A)(6) under Canon 1 of the Code of Professional Responsibility of the Alabama State Bar; Disciplinary Rule DR-5-101(A) under Canon 5 of the Code of Professional Responsibility of the Alabama State Bar; Disciplinary Rule DR-6-101(A) under Canon 6 of the Code of Professional Responsibility of the Alabama State Bar; Disciplinary Rule DR-7-101(A)(1) under Canon 7 of the Code of Professional Responsibility of the Alabama State Bar; Disciplinary Rule DR-7-101(A)(3), DR-7-102(A)(1), DR-7-102(A)(8) under Canon 7 of the Code of Professional Responsibility of the Alabama State Bar.

STATEMENT OF THE CASE

This is an attorney disciplinary case. Petitioner Leon Garmon is an attorney at law who practices in Gadsden, Alabama. Mr. Garmon is a graduate of Glencoe High School, Glencoe, Alabama. During high school, Mr. Garmon was

president of his sophomore and senior classes and he was a delegate to Alabama Boys' State. After graduation, Mr. Garmon attended Howard College. Mr. Garmon was awarded football grants-in-aid from both Howard College and Jacksonville State University.

Upon graduating from college, 1968, Mr. Garmon was commissioned as a Combat Engineer second lieutenant in the United States Army through Officer Candidate School (OCS) at Fort Belvoir, Virginia. Mr. Garmon is also airborne-qualified, and is a qualified Army Ranger. Mr. Garmon has been certified and qualified as a member of the United States Army Special Forces (the "Green Berets"). After assignment to the 197th Infantry Brigade at Fort Benning, Georgia, Mr. Garmon was assigned to and completed one tour of duty with the 173d Airborne Brigade in the Republic of Vietnam. After serving with various United States Army Reserve and Alabama National Guard units and commands, Mr. Garmon attained the rank of Major while serving with the 87th Maneuver Area Command (MAC) of the United States Army Reserve in Birmingham which required a security clearance.

After he returned from Vietnam, in 1971, and was discharged from active military duty, Mr. Garmon applied for and was accepted to Cumberland School of Law from which he graduated in 1974.[1] Mr. Garmon passed the Alabama State Bar examination on his first attempt and was admitted to practice in Alabama on November 21, 1974.

Mr. Garmon is a member of the Bar of this Court, the United States Courts of Appeal for the Fifth and Eleventh Circuits, the United States District Court for the Northern District of Alabama, and the Supreme Court of Alabama. Mr. Garmon's license to practice law in any court has never been suspended, revoked or cancelled.

Mr. Garmon has never been charged with any felony criminal offense. Mr. Garmon has never been charged or

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[1] Mr. Garmon had been admitted to both the Alabama School of Law and Cumberland prior to his military service and he reapplied under the provisions of the Soldiers' and Sailors' Civil Relief Act.

convicted of any misdemeanor offenses except for traffic violations (i.e. speeding, etc.).

Mr. Garmon has been engaged in the private practice of law continuously since 1976. In the past ten years, he has represented 400-500 clients per year in cases ranging from criminal and domestic matters, to legal and medical malpractice cases, civil rights and Voting Rights cases, and other types of civil litigation. Mr. Garmon has been an attorney of record in more than 50 appeals to the appellate courts of Alabama, and the federal appeals courts.

Mr. Garmon has been married to the former Harriet Bolton of Birmingham for over 25 years. Mr. and Mrs. Garmon are the parents of four children, Cam (18 years old), Trent (15 years), and twins Wesley and Leslie (13 years). Cam is mentally retarded and will require lifelong assistance in the activities of daily living.

Mr. Garmon is a member of the First Baptist Church of Gadsden. He is an ordained deacon and former Sunday School teacher. Mr. Garmon has been active since 1976 in the Gadsden Kiwanis Club, the March of Dimes, the Gadsden Quarterback Club and other civic groups.

Mr. Garmon's family's sole income is from his practice of law. Harriet Garmon is employed as his office manager. The family has no other source of income, except Three hundred Five Dollars ($305) per month for Cam Garmon from the Social Security Administration due to his mental retardation.

I. PROCEEDINGS BEFORE THE DISCIPLINARY BOARD OF THE ALABAMA STATE BAR

A. ASB-89-341 (Bearden Complaint)

On September 11, 1990, pursuant to Rule 12(e)(1) of the Alabama Rules of Disciplinary Procedure (Ala.R.Disc.P.), the General Counsel of the Alabama State Bar[2] filed a multi-

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[2] In attorney disciplinary proceedings the General Counsel is the prosecutorial arm of the Alabama State Bar. *See* Rule 6(a)(1), Ala.R.Disc.P.

count complaint against Mr. Garmon in ASB-89-341. The Bar's complaint was founded on certain allegations by June Roberta (Boblitz) Bearden, Mr. Garmon's former client, that Mr. Garmon had neglected a legal matter entrusted to him by Mrs. Bearden and that Mr. Garmon was rude and unprofessional toward her.

June Roberta (Boblitz) Bearden filed a grievance with the Alabama State Bar against Mr. Garmon on June 12, 1989.

For the conduct of his professional relationship with Mrs. Bearden, on September 11, 1990, the Bar charged Mr. Garmon with (1) neglecting a legal matter entrusted to him by Mrs. Bearden (DR-6-101(A), (2) engaging in conduct that is prejudicial to the administration of justice (DR-1-102(A)(5)), (3) engaging in conduct that adversely reflects on his fitness to practice law (DR-1-102(A)(6), (4) intentionally failing to seek the lawful objectives of his client (DR-7-101(A)(1)), and (5) prejudicing or damaging his client (DR-7-101(A)(3)).

After the final hearing, Mr. Garmon was found *NOT GUILTY* of charges 1, 2, and 5, but was found guilty of charges 3 and 4. On these findings of guilty, the Disciplinary Board ordered that Mr. Garmon be suspended from the practice of law for a period of 90 days. (App. B-1-8).

The Disciplinary Board denied Mr. Garmon's motion for a new trial on August 16, 1994.

B. ASB-89-099(A) (Cutchens' Complaint)

The Bar's September 11, 1990, complaint in ASB-89-099(A) was founded on the complaint of James Richard Cutchens, a former client of Mr. Garmon. In essence, the Bar's complaint alleged that Mr. Garmon had intentionally lied to Mr. Cutchens in order to obtain Mr. Cutchens's consent to be a named as one of nine plaintiffs in a declaratory judgment lawsuit seeking to abolish the position of Domestic Referee of Etowah County, civil action number CV-88-552.

Unless the context requires otherwise, the General Counsel and the Alabama State Bar in their disciplinary roles are referred to collectively as "the Bar."

James Richard Cutchens sought out and retained Leon Garmon to represent him in a divorce and child custody action filed by his former wife, Deborah Cutchens, on June 8, 1988, civil action number DR-88-403-DWS, in Etowah County Circuit Court.[3] The divorce complaint filed by Deborah was "referred" by the circuit judge for a hearing on June 29, 1988, before the Etowah County Domestic Referee, Ronald C. Higgins.

According to Mr. Garmon's testimony at the final hearing, when Mr. Cutchens initially visited Mr. Garmon's office on the divorce matter, Mr. Garmon told him that he anticipated filing a declaratory judgment action in Etowah County Circuit Court challenging the legality and constitutionality of the position of Etowah County Domestic Referee, and that he believed Mr. Cutchens had a valid interest in joining that lawsuit as a plaintiff. Mr. Garmon also told him that an "objection" and a motion to "bypass" the Domestic Referee could be filed, because of the increased cost in attorney's fees if that hearing was held and because of the illegitimacy of that position, and a request for a hearing before Etowah County Circuit Court Judge Donald W. Stewart, to whom the divorce case was assigned, could be made.

Mr. Garmon testified that he explained the purpose and potential impact of the proposed declaratory judgment lawsuit to Mr. Cutchens. According to Mr. Garmon, Mr. Cutchens expressed some concern that Judge Stewart would be named as a defendant in the lawsuit and that his "suing the judges" might adversely affect his divorce. Mr. Garmon explained to Mr. Cutchens that, in his opinion, any impact would be negligible because the judges were sued in their official, not individual, capacities and, at any rate, a recusal motion directed to Judge Stewart could be filed and a hearing conducted prior to a final divorce hearing. After having been given all the above information, Mr. Cutchens consented to being named

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[3] There is no indication in the record that Mr. Garmon knew Mr. Cutchens prior to this initial contact. Neither is there any evidence that Mr. Garmon nor anyone acting on his behalf solicited Mr. Cutchens as a client.

as one of ten (10) plaintiffs and agreed to participate in the declaratory judgment lawsuit.

Both Mr. Garmon and Mr. Cutchens testified that Mr. Cutchens understood the "objection" and motion to "bypass" the Domestic Referee, and that he authorized Mr. Garmon to file such an objection and motion.

On July 26, 1988, Mr. Garmon filed civil action number CV-88-552 in Etowah County Circuit Court, a declaratory judgment action challenging the legality and constitutionality of the creation of the position of Etowah County Domestic Referee, and further challenging the legality of the appointment of Ronald C. Higgins to that position. The complaint was 45 pages in length, and was signed by Leon Garmon as attorney for the plaintiffs. Named as plaintiffs in the lawsuit were (1) Derryl D. Ogles; (2) Martha E. Williams; (3) James Richard Cutchens; (4) Jason Wayne Grubbs; (5) Michael Eugene Mitchell; (6) Harold Cecil Haley; (7) Ernest Burton Taylor; (8) Bobby Hugh Tallant; (9) Deborah Finney Eagly; and (10) Tim Ware, all clients of Mr. Garmon. The named defendants were the Domestic Referee, Mr. Higgins, all four sitting circuit court judges in Etowah County and the Alabama Administrative Office of Courts.[4]

On July 26, 1988, the same day the declaratory judgment lawsuit was filed, Mr. Cutchens signed an affidavit, styled and later filed for record in CV-88-552, that stated in part:

> . . . I have read the foregoing Complaint for Declaratory Judgment and/or Writ of Prohibition and/or Petition for a Temporary Restraining Order Regarding the Judicial Authority of the Domestic

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[4] Judge Julius S. Swann, Jr. was the presiding judge in *State v. Terry M. Alford* wherein Mr. Garmon was held in contempt because he asked Judge Julius S. Swann, Jr. to recuse himself and was given a six (6) hour jail sentence on a contempt charge. The Alabama Supreme Court's unpublished Opinion in *Ex Parte Garmon* (No. 1900644) reversed and rendered Juluis S. Swann's judment of contempt against Mr. Garmon. (App. E-51-56).

> Referee for the 16th Judicial Circuit, consisting of forty (*40*) 45 *[J.R.C.]*[5] pages.
>
> I hereby acknowledge that I have authorized my Attorney, Leon Garmon to file this action on my behalf. . . .

(App. E-57)[6]

Mr. Cutchens's affidavit was notarized by Luann Lee, one of Mr. Garmon's secretaries. In her June 16, 1989, affidavit testimony, which was offered and received into evidence at the final hearing in this case, Mrs. Lee testified that:

> On July 26, 1988 Mr. James Richard (Ricky) Cutchens was in Leon Garmon's Law Office for the purpose of signing an Affidavit authorizing Leon Garmon to file suit on his (Mr. Cutchens') behalf against Ronald Higgins, Domestic Referee, and the four (4) Circuit Judges of Etowah County.
>
> I recall that Mr. Cutchens was located in our kitchen when he signed his Affidavit. . . .
>
> After Mr. Garmon had talked with Mr. Cutchens and gave him ample opportunity to read the complaint (consisting of approximately forty-four (44) pages) and his one (1) page affidavit I then witnessed Mr. Cutchens signing his Affidavit authorizing Mr. Garmon to file CV-88-552-JSS on Mr. Cutchens' behalf. Mr. Cutchens had no question about his Affidavit or the complaint and did not hesitate to sign his Affidavit. To the best of my recollection Mr Garmon left the room and was not present when Mr. Cutchens signed his Affidavit.

(App. E-58)

Mr. Garmon testified in substance that he was not present when Mr. Cutchens signed his affidavit, and that he had no

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[5] This change was made and initialed by Mr. Cutchens.

[6] Derryl David Ogles also signed an affidavit (App. E-59-60) which is almost identical to Mr. Cutchen's affidavit and was witnessed by Mary Kristina (Tina) Cash one of Mr. Garmon's secretaries. Ms. Cash's affidavit is almost identical to Ms. LuAnn Lee's affidavit. (App. E-61-62).

reason to dispute Mrs. Lee's recitation of the events of July 26, 1988, regarding Mr. Cutchens.

To the contrary, Mr. Cutchens testified that he was deceived by Mr. Garmon into signing the affidavit. Mr. Cutchens testified that he was told by Mr. Garmon that the affidavit was merely to "bypass" the Domestic Referee and not to "sue the judges." Mr. Cutchens testified that he did not read the affidavit and that he would not have signed it if he had known it authorized Mr. Garmon to "sue the judges" on his behalf. Mr. Cutchens testified that Mr. Garmon was in the room when he signed the affidavit and that Mr. Garmon did not give him time to read the affidavit, but told him to "sign it."

Mr. Cutchens testified at the final hearing that he never agreed to be one of ten (10) plaintiffs in the declaratory judgment lawsuit, and that he did not know he was a plaintiff until *February 1989*.[7] In February 1989, when he learned from "another lawyer" that he had been named as a plaintiff in the declaratory judgment lawsuit, Mr. Cutchens testified that he instructed his then-attorney, Kenneth P. Robertson, Jr., to file a motion to dismiss him as a party plaintiff in the declaratory judgment lawsuit.

On cross-examination, Mr. Cutchens was confronted with his prior inconsistant sworn statements, during a *September 9, 1988*, hearing on his recusal motion before Etowah County Circuit Judge Donald W. Stewart, who was named as a defendant in the declaratory judgment action. The transcript of Mr. Cutchens's testimony before Judge Stewart was offered and accepted into evidence before the Disciplinary Board. (App. E-63-74)

After hearing Mr. Cutchens's testimony, Judge Stewart denied, on page 10 of transcript, the motion for his recusal. (App. E-63-74)

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[7] On cross-examination, Mr. Cutchens did admit, however, that he received a letter from Mr. Garmon shortly after August 8, 1988, enclosing a copy of the affidavit he signed authorizing Mr. Garmon to file the declaratory judgment lawsuit and to name him as a plaintiff.

Judge Stewart testified by telephone before the Disciplinary Board that he was confident that Mr. Cutchens understood the nature of the declaratory judgment lawsuit and that he was voluntarily a plaintiff in that lawsuit at the time of the September 9, 1988, hearing.

Leon Garmon testified that he did not deceive Mr. Cutchens. Mr. Garmon testified that Mr. Cutchens voluntarily signed the sworn authorization to file the declaratory judgment action and that Mr. Cutchens was fully aware and informed of the nature of the lawsuit. Mr. Garmon testified that Mr. Cutchens voluntarily undertook to become a plaintiff in that lawsuit.

Mr. Garmon introduced, without objection by the Bar, into evidence before the Disciplinary Board the affidavits of the seven other clients-plaintiffs in the declaratory judgment lawsuit who had NOT complained that Mr. Garmon had "deceived" them into becoming plaintiffs in that lawsuit.

Mr. Cutchens testified that he is a high school graduate, that he owns his own business, C&S Electric, and that he has owned that business for about 12 years. Mr. Cutchens testified that he could read and write without difficulty and that he could understand words that were written. Mr. Cutchens concluded his testimony by saying that Mr. Garmon had lied to him and had tricked and deceived him in this case. For his alleged ethical transgressions, Mr. Cutchens testified, Mr. Garmon should be disbarred.

For the conduct of his professional relationship with Mr. Cutchens, on September 11, 1990, the Bar charged Mr. Garmon with (1) engaging in conduct involving dishonesty, fraud, deceit, misrepresentation or "other willful misconduct" (DR-1-102(A)(4)), (2) engaging in conduct that is prejudicial to the administration of justice (DR-1-102(A)(5)), (3) engaging in conduct that adversely reflects on his fitness to practice law (DR-1-102(A)(6), and (4) prejudicing or damaging his client (DR-7-101(A)(3)).

After July 2, 1993, the final hearing, Mr. Garmon was found guilty of all four charges brought against him in Mr. Cutchens's case. On these findings of guilty, the Disciplinary

Board ordered that Mr. Garmon be suspended from the practice of law for a period of 180 days. (App. B-1-8). On August 16, 1993, the Disciplinary Board denied Mr. Garmon's motion for a new trial in ASB-89-099(A).

C. ASB-89-173 (Ogles Complaint)

The Bar filed a formal disciplinary complaint against Mr. Garmon on June 5, 1992, in ASB-89-173, founded on the complaint of Derryl David Ogles. As did the complaint in ASB-89-099(A) regarding Mr. Cutchens, the Bar's complaint alleged that Mr. Garmon had intentionally lied to Mr. Ogles in order to obtain Mr. Ogles's consent to be one of ten (10) named plaintiffs in the same declaratory judgment lawsuit seeking to abolish the position of Domestic Referee of Etowah County, CV-88-552. The Bar's formal disciplinary charges against Mr. Garmon in Mr. Ogles's case are founded upon substantially the same facts and allegations as the charges relating to Mr. Cutchens, ASB-89-099(A).

Like Mr. Cutchens, Mr. Ogles, a client of Mr. Garmon's on a divorce modification action, was named one of ten (10) plaintiffs in the declaratory judgment action, CV-88-552, and like Mr. Cutchens, on July 26, 1988, Mr. Ogles signed an affidavit acknowledging that he had read and understood the complaint in that lawsuit and that he authorized Mr. Garmon to file the lawsuit and name him as a plaintiff. Like Mr. Cutchens, Mr. Ogles testified that he was "tricked" by Mr. Garmon into signing the affidavit. Mr. Ogles testified that he was told by Mr. Garmon that the affidavit was merely to "bypass" the Domestic Referee and not to "sue the judges." Mr. Ogles testified that he did not read the affidavit and that he would not have signed it if he had known it authorized Mr. Garmon to "sue the judges" on his behalf. Mr. Ogles testified that Mr. Garmon was not in the room when he signed the affidavit and that Mr. Garmon did not give him time to read the affidavit, but still told him to "sign it." On July 26, 1988, the same day the declaratory judgment lawsuit was filed, Mr. Ogles signed an affidavit, styled and later filed for record in

CV-88-552, which is almost identical to Mr. Cutchen's affidavit. (App. E-59-60)

Mr. Ogles testified at the final hearing that, just as Mr. Cutchens, he never agreed to be a plaintiff in the declaratory judgment lawsuit, and that he did not know he was a plaintiff until February 1989. In February 1989, when he learned that he had been named as a plaintiff in the declaratory judgment lawsuit, Mr. Ogles testified that he instructed his then-attorney, Kenneth P. Robertson, Jr., to file a motion to dismiss him as a party plaintiff in the declaratory judgment lawsuit.

Mr. Ogles's affidavit was notarized by Mary Kristina (Tina) Cash. In her June 16, 1989, affidavit testimony, which was offered and received into evidence at the final hearing in this case, Mrs. Cash testified she witnessed Ogles' signatures after Mr. Garmon talked with him and that he had no questions at that time. Mrs. Cash's affidavit is almost identical to the affidavit of LuAnn Lee regarding Mr. Cutchens affidavit. (App. E-61-62)

On cross-examination, Mr. Ogles testified that he is a convicted felon, having been convicted for second degree theft, about 12 years prior to the hearing. Mr. Ogles testified that he served time in prison for that theft conviction and separately in the county jail for contempt when he willfully refused Judge Swann's order in his divorce case to pay child support.

Leon Garmon testified that he did not deceive Mr. Ogles and that Mr. Ogles voluntarily signed the authorization to file the declaratory judgment action. Mr. Garmon testified that Mr. Ogles was fully aware and informed of the nature of the lawsuit. Mr. Garmon testified that Mr. Ogles voluntarily undertook to become a plaintiff in that lawsuit.

For the conduct of his professional relationship with Mr. Ogles, on June 5, 1992, the Bar charged Mr. Garmon with (1) engaging in conduct involving dishonesty, fraud, deceit, misrepresentation or "other willful misconduct" (DR-1-102(A)(4)), (2) engaging in conduct that is prejudicial to the administration of justice (DR-1-102(A)(5)), (3) failing to refuse employment when Mr. Garmon's own interests may impair his independent professional judgment (DR-5-101(A)),

(4) filing a suit when he knew or when it was obvious that the action would "serve merely to harass or maliciously injure another" (DR-7-102(A)(1)), and (5) knowingly engaging in illegal conduct or conduct that violated a disciplinary rule (DR-7-102(A)(8)).

After the final hearing, Mr. Garmon was found *not guilty* of charge 4, but was found guilty of charges 1, 2, 3 and 5. (App. B-1-8). On these findings of guilty, the Disciplinary Board ordered that Mr. Garmon be suspended from the practice of law for a period of 180 days. (App. B-1-8). On August 16, 1993, the Disciplinary Board denied Mr. Garmon's motion for a new trial in ASB-89-173.

II. MATTERS RELATING TO THE COMPOSITION OF THE DISCIPLINARY BOARD OF THE ALABAMA STATE BAR

At the time of the commencement of the guilt-phase final hearing in ASB-89-099(A) and ASB-89-173 on Thursday, March 18, 1993, and on Friday, March 19, 1993, Commissioner John Percy Oliver, II, of Dadeville (5th Judicial Circuit of Alabama) was a duly appointed member of Panel II and was present for and heard evidence and testimony *ore tenus*. The proceedings in these cases continued through March 18 and March 19, 1993. On March 19, the proceedings were adjourned without completion, to be reset at a time convenient to the Disciplinary Board and the parties.

On Friday, July 2, 1993, the Disciplinary Board reconvened and the parties appeared for the continuation of the guilt-phase hearing and, ultimately, the commencement of the punishment-phase hearing in ASB-89-099(A) and ASB-89-173. On July 2, 1993, Mr. Oliver was not present due to a "schedule conflict." Mr. Garmon orally moved to continue the hearing until such time as Mr. Oliver could be present, but the Disciplinary Board denied that motion. Mr. Garmon expressly objected to being forced to proceed in Mr. Oliver's absence.

The July 2, 1993, continuation of the guilt-phase hearing in ASB-89-099(A) and ASB-89-173 proceeded with only four members of Panel II participating, namely, Chairman Richard

Gill of Montgomery, Commissioners Cain O'Rear of Mobile, Wanda Devereaux of Montgomery and Robert Faulk of Prattville. At the conclusion of the guilt-phase hearing on Friday, July 2, 1993, the Disciplinary Board denied Mr. Garmon's *second* motion for a continuance of the punishment-phase hearing in order to permit the attendance and participation of Mr. Oliver at the punishment-phase hearing. As part of the grounds for his motion for continuance of the punishment-phase hearing, Mr. Garmon alleged that the absence of Mr. Oliver, who heard *all* of the evidence in the guilt-phase hearing in ASB-89-341 and a majority of the evidence in ASB-89-099(A) and ASB-89-173, was substantially prejudicial to his rights to a fair trial and in violation of his constitutionally protected rights to due process of law. The Disciplinary Board denied Mr. Garmon's second motion for a continuance of the punishment-phase hearing.

The consolidated punishment-phase hearing in all three cases, ASB-89-099(A), ASB-89-173 and ASB-89-341, commenced at about 4:50 p.m. on Friday, July 2, 1993, immediately following the conclusion of the guilt-phase hearing. Mr. Oliver was not present for the punishment-phase hearing due to a "schedule conflict."

Judge Stewart testified that in his opinion a pleading or motion filed by Leon Garmon is supported by Leon Garmon's good faith belief and opinion that the matters set out in that document are true. Judge Stewart testified that Judge Swann did not like Leon Garmon.

Judge William W. Cardwell, Jr., who is Judge Swann's successor as presiding judge in the 16th Circuit, testified on behalf of Leon Garmon. Judge Cardwell, who heard Judge Stewart's testimony, testified that he "would agree with everything [Judge Stewart said one hundred percent."

Judge Robert E. Lewis, the senior district court judge in Etowah County, testified that Leon Garmon always adequately represented his clients and that there was no problem with his professionalism.

Judge Charles Wayne Owen, the other district court judge in Etowah County, echoed the testimony of Judge Lewis, and

testified that Leon Garmon set a "good standard for an attorney's good reputation in this community."

SUMMARY OF ARGUMENT

The question of whether the findings of guilty in the instant attorney disciplinary proceedings amount to an impermissible infringement and violation of petitioner's federal constitutional rights under the First, Sixth and Fourteenth Amendments was presented to both the Disciplinary Board of the Alabama State Bar and the Supreme Court of Alabama, and the decisions of the Supreme Court of Alabama on that question are properly reviewable by this Court on certiorari.

The findings of guilty are not based upon any *charged* misconduct, but rather are based on the Disciplinary Board's dislike of Mr. Garmon's actions in filing that lawsuit, and those findings reflect the Disciplinary Board's disapproval of that uncharged misconduct in connection with the Domestic Referee declaratory judgment action. *See Re Ruffalo*, 390 U.S. 544 (1968); U.S. Const. Amend. 14. The Bar did not, in its formal complaints in these cases, charge that the declaratory judgment lawsuit was frivolous, and the Disciplinary Board's finding, as reflected by its findings of guilty, that the lawsuit was frivolous are improper, illegal and contrary to fundamental fairness. It is manifestly unjust to require or expect Leon Garmon to defend himself against "misconduct" that is not charged, and that is exactly what the Disciplinary Board has required and expected in these cases.[8] *Re Ruffalo*, 390 U.S. 544; U.S. Const. Amend. 14.

The adversary disciplinary proceedings against a lawyer should be adjourned and continued in the event that a member of the Disciplinary Board who heard the evidence in a proceeding against a lawyer is not present at the time for a vote on the lawyer's guilt or innocence or the punishment to be imposed, when the member is not absent due to death, life-

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[8] This is also contrary to what J. Anthony McLain, the chief prosecutor in this case, offered in his letter dated January 8, 1992, as a possible settlement. (App. E-75-77)

threatening illness, his own suspension or disbarment, or removal from the Board of Bar Commissioners.

The punishment imposed against Mr. Garmon in these cases, both in terms of the nominal length of the suspensions ordered (*i.e.*, six months) and the probable *actual* length of that suspension (*i.e.*, in excess of one year due to the Bar's administrative delays in submitting a petition for reinstatement to the Disciplinary Board), is excessive and out of proportion to the wrongs found by the Disciplinary Board. U.S. Const. Amends. 5, 8, 14.

Further, the length of the Disciplinary Board's orders of suspension in this case, 90 days then 180 days, are multiples of the 45-day suspension ordered by a different Disciplinary Board panel in ASB-90-775, which punishment is not "final," but apparently was considered by the Disciplinary Board in these cases. In fact, the 45 day suspension ordered in ASB-90-775 (Swann Complaint) was the subject of a separate cert. petition before this court (94-794 filed on November 1, 1994) which was denied on January 9, 1995.

The judgment of the court below in Nos. 1921761, 1921762 and 1921763, ASB-89-099(A), ASB-89-173 and ASB-89-341, respectively, should be reversed and rendered in Mr. Garmon's favor or in the alternative, set aside and this cause remanded to that court for proceedings not inconsistent with Mr. Garmon's constitutional rights.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THE CASE AND MAY APPROPRIATELY DECIDE THE QUESTIONS PRESENTED FOR REVIEW

Section 25 of the Judiciary Act of 1789 granted this Court jurisdiction over and the power to review any "final judgment or decree in any suit" rendered by the highest court of any state in which the suit could be brought. 1 Stat. 73, 75. The present version of section 25 applicable to this case, 28 U.S.C. [sec.] 1257(3), grants the Court jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had by writ of certiorari . . . where the

validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The Court has jurisdiction over a case only if either the constitutionality of a statute is "drawn into question" or a right, title, privilege or immunity under the United States Constitution is "set up or claimed." This standard is met where such a constitutional question has been "either raised or squarely considered and resolved in the state court. [citations omitted]." *Illinois v. Gates*, 462 U.S. 213, 218, fn.1 (1983). In *Gates*, the Court quoted with approval its earlier holding in *Dewey v. Des Moines*, 173 U.S. 193 (1899), in which "the Court said that '[i]f the question were only an enlargement of the one mentioned in the assignment of errors, or it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to now be raised and argued. Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.' [footnote omitted]." 173 U.S. at 197-198, *quoted in Illinois v. Gates*, 462 U.S. at 219-220.[9]

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[9] In Alabama appellate practice, assignments of error are not required to raise an issue on appeal. Rule 20, Ala.R.App.P., provides that "[a]ssignments of error are not required. Statement of the issues presented on appeal in the appellant's brief as required by Rule 28 shall be sufficient."

II. IN THESE THREE CASES, THE DISCIPLINARY BOARD OF THE ALABAMA STATE BAR PREDICATED ITS FINDINGS OF GUILTY, AND IMPOSED PUNISHMENT THEREON, ON PERCEIVED UNCHARGED MISCONDUCT, AGAINST WHICH UNCHARGED MISCONDUCT MR. GARMON WAS NOT CALLED UPON TO DEFEND AND WHICH WAS IMPROPERLY AND UNFAIRLY PRESENTED TO THE DISCIPLINARY BOARD BY THE ALABAMA STATE BAR'S GENERAL COUNSEL AND WHICH WAS UNFAIRLY CONSIDERED BY THE DISCIPLINARY BOARD

The findings of guilty in this case, in spite of the overwhelming evidence that Mr. Garmon was not guilty of any violation, indicates that the Disciplinary Board found fault with, and convicted Mr. Garmon for some perceived and uncharged misconduct in connection with the declaratory judgment lawsuit against the domestic referee and Etowah County's circuit judges in which both Mr. Cutchens, in case number ASB-89-099(A), and Mr. Ogles, in case number ASB-89-173, were named as one of ten (10) plaintiffs.

During the course of the guilt-phase hearing, the Bar asked questions designed to elicit testimony from witnesses and admissions by Mr. Garmon that the declaratory judgment lawsuit against the Etowah County Domestic Referee and the four circuit judges in Etowah County, particularly the late Judge Julius S. Swann, Jr., was "frivolous" and was borne out of Mr. Garmon's personal dislike for the Domestic Referee, Ronald Higgins, and Judge Swann. The Bar's position in questioning of witnesses and argument to the Disciplinary Board was that the actions by Mr. Garmon against the Domestic Referee and Judge Swann, including the lawsuit in which Mr. Cutchens and Mr. Ogles were plaintiffs, were totally devoid of merit and were pursued as a vendetta by Mr. Garmon and not because of a genuine belief by Mr. Garmon that the position of Domestic Referee was illegal under the law. The inference the Bar sought the Disciplinary Board to draw was that Mr. Garmon merely "used" Mr. Ogles and Mr. Cutchens as necessary, although unwilling and ignorant, dupes (*i.e.*,

one of ten persons named as plaintiffs) to further and perhaps consummate his alleged vendetta against Judge Swann and Mr. Higgins.[10]

In his argument and through his questioning, the Bar's assistant general counsel attempted to persuade the Disciplinary Board that Mr. Garmon should be found guilty of filing and prosecuting a frivolous lawsuit against Mr. Higgins, and contriving to have Mr. Cutchens and Mr. Ogles to join as plaintiffs in that lawsuit. In finding Mr. Garmon guilty in these two cases, the conclusion is inescapable that the Disciplinary Board accepted the Bar's argument and found Mr. Garmon to have filed a frivolous lawsuit against the Domestic Referee and the judges in Etowah County. The findings of guilty are not based upon any *charged* misconduct, but rather are based on the Disciplinary Board's dislike of Mr. Garmon's actions in filing that lawsuit, and those findings reflect the Disciplinary Board's disapproval of that uncharged misconduct in connection with the Domestic Referee declaratory judgment action. *See Re Ruffalo*, 390 U.S. 544 (1968); U.S. Const. Amend. 14.

In *Ruffalo*, this Court held that attorney disciplinary proceedings, in both Mr. Garmon and Mr. Ruffalo's case "disbarment" proceedings,[11] are adversary proceedings of a quasi-criminal nature in which the accused lawyer is entitled to "procedural due process, which includes fair notice of the charge" against which he is called upon to defend. 390 U.S. at 550. Quoting with approval the earlier decision in *Randall v. Brigham*, 7 Wall. 523, 540, the *Ruffalo* Court wrote that

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[10] Judge Julius S. Swann, Jr. was the presiding judge in *State v. Terry M. Alford* wherein Mr. Garmon was held in contempt because he asked Judge Julius S. Swann, Jr. to recuse himself and was given a six (6) hour jail sentence on a contempt charge. The Alabama Supreme Court's unpublished Opinion in *Ex Parte Garmon* (No. 1900644) reversed and rendered Juluis S. Swann's judment of contempt against Mr. Garmon. (App. E-51-56).

[11] It was within the Disciplinary Board's discretion to order Mr. Garmon disbarred from the practice of law in Alabama on any finding of guilty in any one of the instant cases. Rule 8, 12(e)(1), Ala.R.Disc.P.

"when proceedings for disbarment are 'not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence.' " 390 U.S. at 550. Prosecution for uncharged misconduct would amount to a "procedural violation of due process [as] would never pass muster in any normal civil or criminal litigation." 390 U.S. at 551, *quoting* Judge Edwards of the Sixth Circuit dissenting in the proceedings below. *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 674-675 (1985)

In the cases numbered ASB-89-099(A), involving Mr. Cutchens, and ASB-89-173, involving Mr. Ogles, Mr. Garmon was called upon to defend against charges alleging that he had deceived those individuals into permitting him to name them two of ten (10) plaintiffs in a declaratory judgment action against the Domestic Referee of Etowah County and the circuit court judges of that county. Mr. Garmon was not charged with having filed a frivolous lawsuit when he commenced that declaratory judgment action, nor was he given notice that he would be called upon to defend the merits of that declaratory judgment lawsuit against the scrutiny of the Alabama State Bar and its Disciplinary Board. The issue before the Disciplinary Board as framed by the disciplinary charges actually filed was whether Mr. Garmon had affirmatively deceived Mr. Ogles and Mr. Cutchens; Mr. Garmon's competence as a lawyer was not properly on trial. Yet, as the formal disciplinary hearing progressed and the findings of guilty were returned, it is obvious that the Alabama State Bar and the Disciplinary Board decided that the underlying declaratory judgment lawsuit was without merit and frivolous, and that finding based on uncharged misconduct, resulted in the findings of guilty. The Disciplinary Board ordered Mr. Garmon suspended from the practice of law for 180 days because it found fault with his lawsuit "against the judges." The evidence before the Disciplinary Board as to his alleged "deception" of Mr. Ogles, a convicted felon, and particularly Mr. Cutchens, even when viewed in the most favorable light

to the Bar, cannot support a finding against Mr. Garmon as to the offenses actually charged.

That conclusion, and only that conclusion, explains why the Disciplinary Board found Mr. Garmon guilty of *any* violation in connection with Mr. Cutchens's and Mr. Ogles's complaints.[12] Whether or not the declaratory judgment action was "frivolous" was not properly before the Disciplinary Board. The Bar did not, in its formal complaints in these cases, charge that the declaratory judgment lawsuit was frivolous, and the Disciplinary Board's finding, as reflected by its findings of guilty, that the lawsuit was frivolous are improper, illegal and contrary to fundamental fairness. It is manifestly unjust to require or expect Leon Garmon to defend himself against "misconduct" that is not charged, and that is exactly what the Disciplinary Board has required and expected in these cases. *Re Ruffalo*, 390 U.S. 544; U.S. Const. Amend. 14.

III. CHANGES IN THE COMPOSITION OF THE DISCIPLINARY BOARD PANEL HEARING THE CHARGES AGAINST MR. GARMON OCCURRING AFTER THE PANEL BEGAN HEARING EVIDENCE *ORE TENUS*, PARTICULARLY THE ABSENCE OF COMMISSIONER OLIVER, WHICH CHANGES WERE NOT CONSENTED TO BY MR. GARMON AND TO WHICH HE PROPERLY OBJECTED, TAINTED THE PROCEEDINGS IN THESE CASES TO SUCH A DEGREE AS TO VIOLATE MR. GARMON'S RIGHTS TO DUE PROCESS AND A FAIR HEARING

At the time of the commencement of the guilt-phase final hearing in ASB-89-099(A), ASB-89-173 and ASB-89-341 on Thursday, March 18, 1993, and Friday, March 19, 1993, Commissioner John Percy Oliver, II, of Dadeville

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[12] This is also contrary to what J. Anthony McLain, the chief prosecutor in this case, offered in his letter dated January 8, 1992, as a possible settlement. (App. E-75-77) McLain offered a "private" reprimand and "public" reprimand for the 3 charges where Garmon received 90, 180 and 180 day suspensions.

(5th Judicial Circuit of Alabama) was a member of Panel II and was present for and heard evidence and testimony *ore tenus*. The proceedings on March 19 were adjourned without completion, to be reset at a time convenient to the Disciplinary Board and the parties.

At the time set for the continuation of the guilt-phase hearing on Friday, July 2, 1993 and, ultimately, the commencement of the punishment-phase hearing in all three cases, Mr. Oliver was not present due to a "schedule conflict."

Mr. Garmon orally moved to continue the hearing until such time as Mr. Oliver could be present, but the Disciplinary Board denied that motion. Mr. Garmon objected to being forced to proceed in Mr. Oliver's absence. The July 2, 1993, continuation of the guilt-phase hearing proceeded with only four members of Panel II participating, namely, Chairman Gill, Mr. O'Rear, Ms. Devereaux and Mr. Faulk. At the conclusion of the guilt-phase hearing on Friday, July 2, 1993, the Disciplinary Board denied Mr. Garmon's *second* motion for a continuance of the punishment-phase hearing in order to permit the attendance and participation of Mr. Oliver at the punishment-phase hearing.

As grounds for his motion for continuance of the punishment-phase hearing, Mr. Garmon alleged, *inter alia*, that the absence of Mr. Oliver, who heard *all* of the evidence in the guilt-phase hearing in ASB-89-341 and a majority of the evidence in ASB-89-099(A) and ASB-89-173, was substantially prejudicial to his rights to a fair trial, U.S. Const. Amend. 5, 8, 14, and moved for a continuance of the punishment-phase hearing until such time as Mr. Oliver could be present to participate therein.

The consolidated punishment-phase hearing in all three cases, ASB-89-099(A), ASB-89-173 and ASB-89-341, commenced at about 4:50 p.m. on Friday, July 2, 1993, immediately following the conclusion of the guilt-phase hearing. Mr. Oliver was not present for the punishment-phase hearing due to that "schedule conflict."

The Alabama Rules of Disciplinary Procedure, which in conjunction with the Alabama Rules of Civil Procedure purport to establish the detailed procedural framework under

which attorney disciplinary proceedings are conducted, Rule 3(b), Ala.R.Disc.P., do not address and do not contemplate the situation presented in these cases. Here, the question is whether a respondent attorney is entitled to have the same five (5) members of the disciplinary board panel who heard the evidence vote on his guilt or innocence and, if a finding of guilty is rendered, the appropriate discipline to be imposed.

As in many other areas of practice under the Alabama Rules of Disciplinary Procedure, there is no guidance as to the proper procedure when a member of the Disciplinary Board who heard the evidence in a proceeding against a lawyer is not present at the time for a vote on the lawyer's guilt or innocence or the punishment to be imposed, when the member is not absent due to death, life-threatening illness, his own suspension or disbarment, or removal from the Board of Bar Commissioners. Like many other issues presented in this petition, this issue presents a situation in which this Court is called upon to measure the procedure under and process of attorney disciplinary proceedings in Alabama against the federal constitutional guarantee of due process. *See Re Ruffalo*, 390 U.S. 544; *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626.

As a matter of fundamental fairness, U.S. Const. Amend. 5, 8, and 14, when a member (such as Mr. Oliver) sits and hears the evidence in a disciplinary proceeding and is not able to be present due to a "scheduling conflict" at the time of voting, absent a compelling reason to proceed, the hearing should be continued at the respondent lawyer's request until that absent member's presence can be obtained.

This Court has specifically held that a lawyer's interest in pursuing his/her profession is protected by the due process clause of the Fourteenth Amendment to the United States Constitution. *Konigsberg v. State Bar*, 353 U.S. 252 (1956); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 and N.5 (1956).

In this case, the Disciplinary Board determined to proceed in Mr. Oliver's absence over Mr. Garmon's objection. Such action, while not apparently prohibited (or even contemplated) by the Rules of Disciplinary Procedure, does not

comport with the notions of fundamental fair-play implicit in those Rules and the Court's decisions in attorney disciplinary matters. *Re Ruffalo*, 390 U.S. 544; *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626. *See Ex parte Cooke*, 263 Ala. 481, 83 So.2d 195, 199 (1955). U.S. Const. Amends. 5, 14.

A fitting analogy of the situation involving Mr. Oliver's absence from the Disciplinary Board in this case may be to the case in which a civil or criminal juror, after the jury is empaneled and has begun hearing evidence, absents himself from the proceedings. Without the parties' agreement, the trial may not proceed with less than 12 members and another member cannot be selected from the jury venire (or the public) to replace the seated and absent juror. It is fundamentally unfair to expect the parties in civil or criminal litigation to consent to the absence of a juror, and this Court would not countenance such a procedure over a party's objection, and it is equally unfair to require an attorney in Bar disciplinary proceedings, who has every bit as much to lose as other litigants, to be subjected to the decision of a Disciplinary Board panel composed of different members (or not all the same members) who began hearing the evidence in the attorney's case.

Because of the patent unfairness of the Disciplinary Board's overruling Mr. Garmon's multiple motions to continue these proceedings until such time as Mr. Oliver's presence could be obtained, the findings of guilty and punishment in all three cases, ASB-89-099(A), ASB-89-173 and ASB-89-341, should be reversed. U.S. Const. Amends. 5, 8, and 14. Only by reversing the findings of guilty and punishment in these cases can this Court assure that the Disciplinary Board, and the general counsel of the Bar, will scrupulously and "zealously" safeguard the fundamental right of a respondent attorney to a fair hearing of and decision on the allegations of impropriety brought against him.

IV. THE PUNISHMENT IMPOSED BY THE DISCIPLINARY BOARD OF THE ALABAMA STATE BAR IN THESE CASES IS EXCESSIVE AND DISPROPORTIONATE TO THE OFFENSES COMMITTED AND THE LENGTH OF THE ORDERED SUSPENSIONS INDICATES THE DISCIPLINARY BOARD IMPROPERLY CONSIDERED PRIOR NON-FINAL DISCIPLINE IMPOSED AGAINST MR. GARMON IN DETERMINING THE PUNISHMENT IN THESE CASES, ALL CONTRARY TO MR. GARMON'S DUE PROCESS AND EQUAL PROTECTION RIGHTS AS WELL AS HIS RIGHT TO BE PROTECTED AGAINST CRUEL AND UNUSUAL PUNISHMENT

Neither this Court nor Alabama's Supreme Court has adopted a "bright-line" test for determining whether or not the Bar's discipline is excessive, thereby violating the accused attorney's property interest in the practice of law, or appropriate. Because of the lack of a bright-line test, there is no controlling "authority" to discuss or cite as to why the punishment in these cases is excessive to the point of constituting a federal constitutional violation. Rather, Mr. Garmon seeks this Court's determination that, as a matter of due process and fundamental fairness, lawyers in Alabama and the nation who commit the same type violations found in these cases should not suffer discipline that poses a very real threat to their continued economic livelihood. U.S. Const. Amends. 5, 8, 14.

Even when a former Alabama State Bar president was charged with willful failure to file an income tax return for four years and pleaded guilty and was convicted of failing to pay income taxes, and fined $20,000. The Bar determined that the convicted former Bar president should be *suspended for only 45 days*, which would permit his automatic reinstatement after serving that suspension. (App. E-78) *See Huckaby v. Alabama State Bar*, 631 So.2d 855 (Ala. 1993).[13] After further investigation, the Disciplinary Commission ruled that Mr.

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[13] Gary Carlton Huckaby of Huntsville, was president of the Alabama State Bar in 1988-1989. Mr. Huckaby had failed to pay income taxes

Huckaby should serve a 45 day suspension for his failure to pay income taxes. On September 3, 1994, a two by two and one-half inch (2" x 2½") notice of suspension was run in the *Huntsville Times*, located in the legal classified section. This notice was to inform the general public of his 45-day suspension due to his guilty plea for a criminal misdemeanor for wilful failure to file income tax return (App. E-80-93) Mr. Huckaby's serious federal crime and the Bar's minimal punishment for that crime, when compared to and contrasted with the "offenses" of which Mr. Garmon was found guilty in these cases, does not evidence the desired "consistency of punishment" that is the goal of the attorney disciplinary process in Alabama, as required by the equal protection clause and declared by this Court in adopting Standard 1.3(3) of the Alabama Standards for Imposing Lawyer Discipline.[14] U.S. Const. Amends. 5, 14.

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for four years. (App. E-79) He was indicted for willful failure to pay income tax for the year 1988. On April 3, 1992, Mr. Huckaby plead guilty in the United States District Court for the Northern District of Alabama, case number CR-92-P-039-NE of the criminal offense of willful failure to file an income tax return for tax year 1988, a misdemeanor which said return was due to be filed on or before August 15, 1989. Mr. Huckaby's plea agreement made it possible for him to serve no jail time, but put on probation and pay a substantial fine in installments. That criminal conviction is now final for all purposes. (App. E-80-93).

Mr. Huckaby was at the time of his conviction, and is presently, a member of one of the largest lawfirm's in the State of Alabama, Bradley, Arant, Rose & White, with offices in Birmingham and Huntsville. Mr. Huckaby is a member of the Huntsville Branch.

Mr. Huckaby's notice of suspension was a 2" x 2" notice that appeared in the legal section of the *Huntsville Times*. (App. E-94)

[14] Another Huntsville attorney, Barbara C. Miller, a solo practitioner, was given a public reprimand for " . . . failure to comply with certain rules relating to advertising by lawyers in the State of Alabama." Pursuant to Rule 33 of the Alabama rules of Disciplinary Procedures, the *Huntsville Times*, ran a four by six and one-half inch (4" x 6½") notice, provided by the Alabama State Bar, and located it in the main body of the newspaper. (App. E-95)

When compared and contrasted with the size and location of Ms. Miller's required notice in the *Huntsville Times*, it appears that the Bar's

The conduct for which Mr. Garmon is punished in these cases does not warrant an effective one-year to 18-month suspension. U.S. Const. Amends. 5, 8, 14. While on the Disciplinary Board's findings of guilty, if those findings are affirmed by the Court (even though those findings are not supported by "clear and convincing" evidence and are not supported by the law), appropriate discipline would be a private reprimand or public reprimand. A suspension of 180 days effectively puts an end (for at least one year and probably longer) to Mr. Garmon's career is excessive, unjust and wholly inappropriate. U.S. Const. Amend. 5, 8, 14.

In addition, it is significant that the length of the Disciplinary Board's orders of suspension in this case, 90 days then 180 days, are multiples of the 45-day suspension ordered by a different Disciplinary Board panel in ASB-90-775, which punishment is not "final,"[15] but apparently was considered by the Disciplinary Board in these cases to be the base from which discipline in ASB-89-341 (Bearden) (90-day suspension), ASB-89-099A (Cutchens) (180-day suspension) and ASB-89-173 (Ogles) (180-day suspension) would rise.

The Disciplinary Panel's action in ordering a 180-day suspension violated Leon Garmon's right to a fair and impartial tribunal.

A fair and impartial judge is a basic due process guarantee. The Supreme Court held in *In Re Murchison*, 349 U.S. 133, 136 (1955), that:

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interpretation of Standard 1.3(3) of the Alabama Standards for Imposing Lawyer Discipline as it pertains to Mr. Huckaby (a 2" x 2" notice hidden in the "legal" section of the Huntsville Times) and Ms. Miller does not guarantee "consistency of punishment" or notice to the general public of disciplinary action taken by the Alabama State Bar. The costs of the public notice assessed Barbara C. Miller were about triple the costs for Gary C. Huckaby's notice in the *Huntsville Times*.

[15] The 45 day suspension was the subject of a separate cert. petition (Number 94-794 filed on November 1, 1994), this court denied cert on January 9, 1995.

> "[A] trial in a fair tribunal is a basic requirement of due process. Fairness requires an absence of actual bias in the trial of cases."

In *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) the Court held that:

> "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law."

Not only is the absence of actual bias required but even a hint or appearance of bias is to be avoided. *Offutt v. United States*, 348 U.S. 11, 14 (1955); *In Re Murchison, supra; United States v. Columbia Broadcasting*, 497 F.2d 107, 109 (5th Cir. 1974). This is because even the possibility of prejudice on the "part of the judge . . . is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see also*, *Potashnick v. Port City Construction Co.*, 609 F. 2d 1101, 111 (5th Cir. 1980); *King v. State*, 246 Ga. 390 (1980).

In *Wall v. American Optometric Ass'n*, 379 F. Supp. 175 (N.D. Ga.), *Aff'd* 419 U.S. 888 (1974), the Court stated:

> "The test of due process looks to the totality of circumstances, and particularly, as concerns judicial proceedings, due process entails not merely having one's case heard by an impartial tribunal in the first instance, but having the process of decision be impartial in every instance and in every respect."

In these cases, the Disciplinary Board imposed a punishment on Mr. Garmon that would be appropriate for much more serious transgressions than those found here. The Court should grant certiorari and vacate the suspensions ordered by the Disciplinary Board in this case. U.S. Const. Amends. 5, 8, 14.[16]

---

[16] This is also contrary to what J. Anthony McLain, the chief prosecutor in this case, offered in his letter dated January 8, 1992, as a possible settlement. (App. E-75-77) McLain offered a "private" reprimand and "public" reprimand for the 3 charges where Garmon received 90, 180 and 180 day suspensions.

CONCLUSION

The decision of the Supreme Court of Alabama affirming Mr. Garmon's conviction for violating the attorney disciplinary rules as alleged in this case necessarily sanctions the unbridled infringement of the rights of Mr. Garmon, as well as other members every state's bar, to due process of law, equal protection of the law, and protection against cruel and unusual punishment. The judgment of the Alabama State Bar's Disciplinary Board in these proceedings, and the affirmance of the Disciplinary Board's judgments by the Supreme Court of Alabama, without *any* written opinion directly flagrantly ignore Mr. Garmon's Fourteenth and Eighth Amendment protections in these attorney disciplinary matters.

From its actions, or no-opinion inactions, it is obvious that the Alabama court will do nothing to protect the members of its own bar from gross and far-ranging constitutional deprivation, and will ignore, when it is convenient to do so, the fundamental constitutional rights of its own citizens. For that reason, and because of the potential impact of the Alabama court's decision on the Eighth and Fourteenth Amendment rights of attorneys across the nation, this Court should exercise its jurisdiction and reaffirm the existence and reach of the constitutional protections here trampled by the Alabama State Bar's Disciplinary Board and the Alabama Supreme Court.

The judgment of the court below in Nos. 1921761, 1921762 and 1921763, ASB-89-099(A), ASB-89-173 and ASB-89-341, respectively, should be reversed and rendered in Mr. Garmon's favor or in the alternative, set aside and this

cause remanded to the Alabama Supreme Court for proceedings not inconsistent with Mr. Garmon's constitutional rights.

Respectfully submitted,

JULIAN L. MCPHILLIPS, JR.
Attorney for Petitioner
MCPHILLIPS, SHINBAUM & GILL
Post Office Box 64
516 South Perry Street
Montgomery, Alabama 36101
(205) 262-1911

January 26, 1995

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STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE SUPREME COURT
SPECIAL TERM, 1994
(Released Aug. 5, 1994)

1921761, 1921762, 1921763

Leon Garmon v. Alabama State Bar, Appeals from Alabama State Bar Disciplinary Committee (ASB-89-099, 89-173, 89-341)

PER CURIAM.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and Rule 53(a)(2)(A) and (F), Ala.R.App.P.

Maddox, Almon, Shores, Houston, and Ingram, JJ., concur.

BEFORE THE DISCIPLINARY BOARD
OF THE ALABAMA STATE BAR

IN THE MATTER OF	)	CASE NO. ASB
	)	89-099(A)
MILFORD LEON GARMON,	)	
	)	
AN ATTORNEY AT LAW	)	

FINDINGS AND ORDER

The Disciplinary Board, Panel II, having duly convened, and having received evidence on behalf of the Alabama State Bar and the respondent attorney, and having considered same, finds:

1. That the facts as alleged in the formal charges in this matter have been proved by clear and convincing evidence;

2. That the respondent attorney is therefore guilty of Charge I of the formal charges in this matter in that he engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or willful misconduct, a violation of Disciplinary Rule 1-102(A)(4);

3. That the respondent attorney is guilty of Charge II of the formal charges in that he engaged in conduct prejudicial to the administration of justice, a violation of Disciplinary Rule 1-102(A)(5);

4. That the respondent attorney is guilty of Charge III of the formal charges in that the respondent attorney engaged in conduct which adversely reflects on his fitness to practice law, a violation of Disciplinary Rule 1-102(A)(6);

5. That the respondent attorney is guilty of Charge IV of the formal charges in that the respondent attorney prejudiced or damaged his client during the course of the professional relationship, a violation of Disciplinary Rule 7-101(A)(3).

The Disciplinary Board further received evidence as to both mitigating and aggravating circumstances as to the issue of discipline. Having considered same, the Disciplinary Board hereby orders that the respondent attorney be suspended from the practice of law in the State of Alabama for a period of one hundred eighty (180) days, said suspension to become effective immediately upon issuance of an order by the Supreme Court of Alabama. It is further ordered that said suspension be imposed to run concurrently with the 180-day suspension ordered in ASB No. 89-173 and the ninety (90) day suspension ordered in 89-341.

Pursuant to Rule 12(f), Alabama Rules of Disciplinary Procedure, any appeal of this order must be made in full compliance with the provisions thereof.

DONE this the 2nd day of July, 1993.

/s/ Richard H. Gill
Richard H. Gill, Chairman
Disciplinary Board, Panel II
Alabama State Bar
P.O. Box 347
Montgomery, AL 36101-0347

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was served upon the respondent attorney, Milford Leon Garmon, 945 Forrest Avenue, Gadsden, AL 35901, respondent attorney's counsels, Michael Allsup, 945 Forrest Avenue, Gadsden, AL 35901, and Julian L. McPhillips, Jr., P.O. Box 64, Montgomery, AL 36101, and J. Anthony McLain, Assistant General Counsel, P.O. Box 671, Montgomery, AL 36101, by United States mail, postage prepaid, on this the 14th day of July, 1993.

/s/ Richard H. Gill
Richard H. Gill, Chairman
Disciplinary Board, Panel II
Alabama State Bar

BEFORE THE DISCIPLINARY BOARD OF THE ALABAMA STATE BAR

IN THE MATTER OF	)	CASE NO. ASB
	)	89-173
MILFORD LEON GARMON,	)	
	)	
AN ATTORNEY AT LAW	)	

FINDINGS AND ORDER

The Disciplinary Board, Panel II, having duly convened, and having received evidence on behalf of the Alabama State Bar and the respondent attorney, and having considered same, finds:

1. That the facts as alleged in the formal charges in this matter have been proved by clear and convincing evidence;

2. That the respondent attorney is therefore guilty of Charge I of the formal charges in this matter in that he engaged in conduct involving dishonesty, fraud, deceit, misrepresentation, or willful misconduct, a violation of Disciplinary Rule 1-102(A)(4);

3. That the respondent attorney is guilty of Charge II of the formal charges in that he engaged in conduct prejudicial to the administration of justice, a violation of Disciplinary Rule 1-102(A)(5);

4. That the respondent attorney is guilty of Charge III of the formal charges in that he accepted employment when the exercise of his professional judgment on behalf of his client was or reasonably was affected by his own financial, business, property, or personal interests, a violation of Disciplinary Rule 5-101(A);

5. That the respondent attorney is guilty of Charge V of the formal charges in that he, in his representation of his client, knowingly engaged in other illegal conduct or conduct contrary to a Disciplinary Rule; a violation of Disciplinary Rule 7-102(A)(8);

6. That the respondent attorney is not guilty of Charge IV of the formal charges in this matter.

The Disciplinary Board further received evidence as to both mitigating and aggravating circumstances as to the issue of discipline. Having considered same, the Disciplinary Board hereby orders that the respondent attorney be suspended from the practice of law in the State of Alabama for a period of one hundred eighty (180) days, said suspension to become effective immediately upon issuance of an order by the Supreme Court of Alabama. It is further ordered that said suspension be imposed to run concurrently with the 180-day suspension ordered in ASB No. 89-99(A) and the ninety (90) day suspension ordered in 89-341.

Pursuant to Rule 12(f), Alabama Rules of Disciplinary Procedure, any appeal of this order must be made in full compliance with the provisions thereof.

DONE this the 2nd day of July, 1993.

/s/ Richard H. Gill
Richard H. Gill, Chairman
Disciplinary Board, Panel II
Alabama State Bar
P.O. Box 347
Montgomery, AL 36101-0347

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was served upon the respondent attorney, Milford Leon Garmon, 945 Forrest Avenue, Gadsden, AL 35901, respondent attorney's counsels, Michael Allsup, 945 Forrest Avenue, Gadsden, AL 35901, and Julian L. McPhillips, Jr., P.O. Box 64, Montgomery, AL 36101, and J. Anthony McLain, Assistant General Counsel, P.O. Box 671, Montgomery, AL 36101, by United States mail, postage prepaid, on this the 14th day of July, 1993.

/s/ Richard H. Gill
Richard H. Gill, Chairman
Disciplinary Board, Panel II
Alabama State Bar

BEFORE THE DISCIPLINARY BOARD OF THE ALABAMA STATE BAR

IN THE MATTER OF	)	CASE NO. ASB
	)	89-341
MILFORD LEON GARMON,	)	
	)	
AN ATTORNEY AT LAW	)	

FINDINGS AND ORDER

The Disciplinary Board, Panel II, having duly convened, and having received evidence on behalf of the Alabama State Bar and the respondent attorney, and having considered same, finds:

1. That the facts as alleged in the formal charges in this matter have been proved by clear and convincing evidence;

2. That the respondent attorney is therefore guilty of Charge III of the formal charges in this matter in that he engaged in conduct that adversely reflects on his fitness to practice law, a violation of Disciplinary Rule 1-102(A)(6);

3. That the respondent attorney is guilty of Charge IV of the formal charges in this matter, in that he failed to seek the lawful objectives of his client, a violation of Disciplinary Rule 7-101(A)(1);

4. That the respondent attorney is not guilty of Charges I, II, and V of the formal charges in this matter.

The Disciplinary Board further received evidence as to both mitigating and aggravating circumstances as to

the issue of discipline. Having considered same, the Disciplinary Board hereby orders that the respondent attorney be suspended from the practice of law in the State of Alabama for a period of ninety (90) days, said suspension to become effective immediately upon issuance of an order by the Supreme Court of Alabama. It is further ordered that said suspension be imposed to run concurrently with the 180-day suspensions ordered in ASB Nos. 89-99(A) and 89-173.

Pursuant to Rule 12(f), Alabama Rules of Disciplinary Procedure, any appeal of this order must be made in full compliance with the provisions thereof.

DONE this the 2nd day of July, 1993.

/s/ Richard H. Gill
Richard H. Gill, Chairman
Disciplinary Board, Panel II
Alabama State Bar
P.O. Box 347
Montgomery, AL 36101-0347

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was served upon the respondent attorney, Milford Leon Garmon, 945 Forrest Avenue, Gadsden, AL 35901, respondent attorney's counsels, Michael Allsup, 945 Forrest Avenue, Gadsden, AL 35901, and Julian L. McPhillips, Jr., P.O. Box 64, Montgomery, Al 36101, and J. Anthony McLain, Assistant General Counsel, P.O. Box 671, Montgomery, AL 36101, by United States mail, postage prepaid, on this the 13th day of July, 1993.

/s/ Richard H. Gill
Richard H. Gill, Chairman
Disciplinary Board, Panel II
Alabama State Bar

C-1

IN THE SUPREME COURT OF ALABAMA
October 28, 1994

1921761

Leon Garmon v. Alabama State Bar. (ASB: 89-099)

1921762

Leon Garmon v. Alabama State Bar. (ASB: 89-173)

1921763

Leon Garmon v. Alabama State Bar. (ASB: 89-341).

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

PER CURIAM – Maddox, Almon, Shores, Houston and Ingram, JJ., concur.

IN THE SUPREME COURT OF ALABAMA

1921761, 1921762, and 1921763

LEON GARMON,

APPELLANT

– VERSUS –

ALABAMA STATE BAR,

APPELLEE

APPEALS FROM THE DISCIPLINARY BOARD OF
THE ALABAMA STATE BAR
ASB-89-099, ASB-89-173, and ASB-89-341

---

1) APPLICATION TO VACATE ORDERS DATED AUGUST 5, 1994, AND OCTOBER 28, 1994; 2) APPLICATION TO REDUCE 180-DAY SUSPENSION TO 45-DAY TO RUN CONCURRENT WITH 1920598 (ASB 90-775); 3) APPLICATION FOR STAY OF EXECUTION OF PUNISHMENT IN ATTORNEY DISCIPLINARY PROCEEDINGS PENDING FILING AND DETERMINATION OF APPELLANT'S PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES
(Filed Nov. 14, 1994)

COMES NOW the appellant, Leon Garmon, in the above-styled proceedings in this Court, by and through his undersigned counsel, and applies to and moves the Court for a stay of the execution of the punishment imposed against appellant in these attorney disciplinary cases for a reasonable time to permit the appellant to file and have determined a petition for writ of certiorari in

the Supreme Court of the United States for review of this Court's affirmance of the findings and discipline ordered by the Disciplinary Board of the Alabama State Bar, which said review by the Supreme Court of the United States would be meaningless if the punishment of appellant is carried out prior to his exercise of his right to seek certiorari in that Court.

For grounds and in support of this application, Leon Garmon, appellant, shows and represents unto the Court as follows:

1. On August 5, 1994, this Court affirmed without opinion the findings of guilty and discipline imposed against appellant by the Disciplinary Board of the Alabama State Bar in ASB 89-099 (#1921761), ASB 89-173 (#1921762), ASB 89-341 (#1921763), respectively.

2. In ASB 89-099, the Disciplinary Board ordered that Mr. Garmon be suspended from the practice of law for a period of 180 days, to run concurrent with the discipline imposed in ASB 89-173 and ASB 89-341.

3. In ASB 89-173, the Disciplinary Board ordered that Mr. Garmon be suspended from the practice of law for a period of 180 days, to run concurrent with the discipline imposed in ASB 89-099 and ASB 89-341.

4. In ASB 89-341, the Disciplinary Board ordered that Mr. Garmon be suspended from the practice of law for a period of 90 days, to run concurrent with the discipline imposed in ASB 89-099 and ASB 89-173.

5. On October 28, 1994, this Court overruled, without any opinion, Mr. Garmon's application for rehearing in 1921761, 1921762, and 1921763.

6. The Alabama State Bar had made an effort of settlement of pending disciplinary complaints against Leon Garmon in a three-page letter dated January 8, 1992, a copy attached herewith as *Exhibit "A."*

A. In ASB 89-099 (#1921761), the Alabama State Bar stated in Paragraph 2 the "factual allegations and specific disciplinary rules alleged to have been violated in this case appear to justify, if proved at a hearing, a public reprimand without general publication.

B. In ASB 89-173 (#1921762), the Alabama State Bar, in Paragraph 10, offered a "Private reprimand."

C. In ASB 89-341 #1921763), Mr. McLain stated "Finally, concerning ASB 89-341, I have written Ms. Bearden inquiring as to whether her mother's house ever sold, and whether the estate has been concluded. Once I receive any response from her, I will likewise pass that information along to you.

NOTE: The property was sold and the client suffered no injury from Leon Garmon's delay in the sale of the property.

7. In overruling Mr. Garmon's application for rehearing, the Court did not order a stay of imposition of the 180-day suspension in 1921761 (ASB 89-099), the 180-day suspension in 1921762 (ASB 89-173), or the 90-day suspension in 1921763 (ASB 89-341) until appellant had filed a petition for writ of certiorari to the Supreme Court of the United States.

8. This Court's affirmance without opinion leaves unresolved substantial questions of federal constitutional

law unresolved and subject to varying interpretations by the several states' rule-making and attorney disciplinary bodies, as well as the courts of last resort in each state.

9. Particularly, the Court's affirmance, without opinion, in these cases fails to determine the limitations placed on state attorney disciplinary boards by the First, Eighth, and Fourteenth amendments to the United States Constitution in prosecuting attorneys for the contents of a written employment contract when the contents of that contract are not false or misleading (ASB 89-099 and ASB 89-173).

10. Particularly, the Court's affirmance, without opinion, in these cases fails to determine the limitations placed on state attorney disciplinary boards by the First, Eighth, and Fourteenth amendments to the United States Constitution in prosecuting attorneys for the alleged delay of less than 90 days in fulfilling a legal matter where there was no injury to the client. (ASB 89-341)

11. In light of fundamental First Amendment free speech analysis, the prosecution by the Alabama State Bar of Mr. Garmon for filing a declaratory judgment case (CV-88-552) involving the Etowah County Domestic Referee, appears to be in conflict with the decisions of the federal and other state courts on substantially the same point. *See Eisenberg v. Boardman*, 302 F.Supp. 1360 (D. Wis. 1969); *State Bar v. Semaan*, 508 S.W.2d 429 (Tex. Civ. App. 1974); *Re Disbarment of Ojala*, 289 N.W.2d 108 (Minn. 1979), all holding that the rule stated in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 95 A.L.R.2d 1412 (1964), is applicable to attorney disciplinary proceedings. In filing the declaratory judgment

action regarding the domestic referee, made in his role as an attorney for ten clients appearing before the domestic referee, Mr. Garmon's actions are protected by the First Amendment from criminal, civil, and attorney disciplinary liability, unless the statements and allegations are made with knowledge that they were false or with reckless disregard as to whether they are false. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 95 A.L.R.2d 1412.

12. Under Rule 13.1 of the Rules of the Supreme Court of the United States (S.C.R.), Mr. Garmon may petition that Court for a writ of certiorari to review the decision of this Court in these cases within ninety (90) days of the date of this Court's order overruling his application for rehearing. That petition must, therefore, be filed not later than Thursday, January 26, 1995.

13. Mr. Garmon intends to file such a petition for writ of certiorari in the Supreme Court of the United States and will file that petition not later than the last day permitted under Rule 13.1.

14. The basis for seeking certiorari in the United States Supreme Court in these cases is found in Rule 10.1(b), S.C.R., viz: The decision of this Court in these cases "has decided a federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals." Further, it appears that the United States Supreme Court has not addressed the extent of an attorney's First Amendment protection in a case such as this and, therefore, Rule 10.1(c), S.C.R., is applicable, providing that certiorari may be granted "[w]hen a state court or a United States court of appeals

has decided an important question of federal law which has not been, but should be, settled by [the United States Supreme] Court. . . . "

15. Execution of those judgments of suspension during the period in which Mr. Garmon has the right to seek certiorari in the Supreme Court of the United States, along with other appropriate federal remedies, would render his right to petition for certiorari a nullity. If the suspension is ordered into effect immediately, any remedy provided by the federal courts would be worthless since the ordered punishment would have already been served by the time the federal courts act.

16. In exercise of its "right of supervision" of the conduct of attorneys and the Alabama State Bar, *Noojin v. Alabama State Bar*, 577 So.2d 420, 423-425 (Ala. 1991), this Court should order that the discipline imposed by the Alabama State Bar in these three cases, ASB 89-341 (90-day suspension); ASB 89-099 (180-day suspension); ASB 89-173 (180-day suspension), be suspended and stayed for a reasonable time pending a decision by the United States Supreme Court on Mr. Garmon's petition for writ of certiorari by reducing the 180-day suspension to 45 days.

17. In reviewing the record, this Court should reduce the 180-day suspension to a 45-day suspension to run concurrent with the 45-day suspension imposed in #1920598 (ASB 90-775).

18. Any suspension periods which exceed 91 days requires a petition for reinstatement which takes about 4-6 months once the period of suspension has been served.

19. Leon Garmon is a sole practitioner whose wife is employed as his office manager.

20. Leon and Harriet Garmon have four children: Cam, age 18, who is mentally retarded and will need lifetime assistance; Trent, age 15; and twins, Leslie and Wesley, age 13.

21. The Garmons have no other source of income and it would be quite difficult for either Leon Garmon or Harriet Garmon to find employment during a 180-day suspension.

22. There can be no conceivable prejudice to the Alabama State Bar by reducing the 180-day suspension to 45 days to run concurrent with ASB 90-775, but there would be a substantial prejudice to Mr. Garmon's constitutional rights of due process and a 180-day suspension would be both fundamentally unfair and manifestly unjust.

WHEREFORE, premises considered, Leon Garmon applies to and moves the Court for the following relief, to-wit:

(1) a stay of the execution of the punishment imposed against appellant in these attorney disciplinary cases for a reasonable time to permit the appellant to file and have determined a petition for writ of certiorari in the Supreme Court of the United States for review of this Court's summary affirmance of the findings and discipline ordered by the Disciplinary Board of the Alabama State Bar;

(2) a reduction of the 180-day suspension to 45 days to run concurrent with #1920598 (ASB 90-775);

(3) and for such other, further and general relief to which appellant may be entitled in the circumstances.

Respectfully submitted,

/s/ Julian L. McPhillips, Jr.
JULIAN L. MCPHILLIPS, JR.
McPhillips, Shinbaum & Gill
P.O. Box 64
Montgomery, AL 36101
(205) 262-1911

Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing application for stay on counsel of record for the appellee, whose name and address are listed below on this 14th day of November, 1994.

/s/Julian McPhillips, Jr.
Appellant's Attorney

COUNSEL FOR APPELLEE

J. Anthony McLain, Esquire
Assistant General Counsel
Alabama State Bar
415 Dexter Avenue
Post Office Box 671
Montgomery, AL 36101
(205) 269-1515

EXHIBIT "A"

[seal]
ALABAMA STATE BAR
THE DISCIPLINARY COMMISSION
TELEPHONE 205-269-1515
1019 SOUTH PERRY STREET
MONTGOMERY, ALABAMA 36104

January 8, 1992

Mr. Milford Leon Garmon
Attorney at Law
945 Forrest Avenue
Gadsden, AL 35901

Re: Pending Complaints

Dear Mr. Garmon:

Pursuant to our meeting of December 17, 1991 at your law offices, and your request that I consider the possibility of settlement of some or all of the charges presently pending against you, I provide the following information:

1. ASB 89-81 – The violations alleged, if established by the evidence at a hearing thereon, would appear to justify a suspension. However, as in each case, any mitigating circumstances could reduce this to a public reprimand with general publication.

2. ASB 89-99(A) – The factual allegations and specific disciplinary rules alleged to have been violated in this case appear to justify, if proved at a hearing, a public reprimand without general publication.

3. ASB 89-341 – Likewise, this case would appear to justify, on its alleged facts and specified disciplinary rules violations, a public reprimand.

4. ASB 89-671(B) – The alleged disrespect shown for the client in this matter would appear to justify a private reprimand.

5. ASB 90-424 – Since this matter was initially recommended as a private reprimand, I would stand by that recommendation and allow this case to be disposed of for that stated discipline.

6. ASB 89-148 – Coupled with 90-601(B), which alleges basically the same substantive violations, i.e., allowing Allsup to engage in, and possibly assisting him in the unauthorized practice of law, would appear to justify a definite term of suspension.

7. ASB-90-575 and ASB 90-758 – The claims of the filing of frivolous counter-claims, and the conflict of interest questioned by the judge in the bankruptcy matter appear to justify, on the alleged facts and alleged rules violations, a term of definite suspension.

8. ASB 90-527 and 90-775 – This continued battle with Judge Swann, the alleged disrespect for the court and alleged bad faith pleading would likewise appear to justify a term of definite suspension.

9. ASB 89-409 – The allegations appear to justify a public reprimand with general publication for attempting to perpetrate a fraud on the tribunal.

10. ASB 89-173 – Private reprimand.

11. ASB 89-321 and 90-900 – The continuation of your ongoing dispute with Ken Robertson is, as I have stated to you earlier, an obvious concern of the Bar. In ASB 89-321, you stated that I should consider that case as part and parcel of ASB 90-632 and that the same discipline be

imposed. However, I disagree with your assessment that one reprimand (private) should be administered for all the letters you wrote, as I feel each should be considered a separate violation of the rules. However, I would be willing to recommend a separate private reprimand in ASB 89-321 consistent with that which I have previously recommended you receive on your request for reconsideration in ASB 90-632. In ASB 90-900, I would likewise recommend a private reprimand.

Based on the conversation we had at your office on December 17, 1991, to the effect that you would obviously not agree to any form of suspension, it does not appear that those cases wherein I think suspension would be appropriate discipline if you were found guilty of the facts and rules violations alleged in those respective cases, I would prefer that you write to me informing me as to your assessment of each of these cases and as to any conditional guilty plea which you would be willing to submit at this time.

Please let me hear from you in this regard within the next ten days. As we discussed earlier, in the event some of these cases can be disposed of in the form of conditional guilty pleas, now would be the time to proceed in that regard. Once I have received your thoughts as to any possible settlement of any of these cases, I will then assess the entire package of charges and pending complaints once again to see if any of these can be disposed of. If any are disposed of, I will then review the remaining case files to inform you as to the witnesses I would expect to call in each of those remaining respective cases.

Also, per your request, please find enclosed a copy of the response which you filed in ASB 90-424. It was my understanding from you and your law clerk, Mike Allsup, that you could not locate nor determine whether such a response had been filed. Our records disclosed that such a response was filed, in addition to other pleadings, with copies of all such pleadings filed by you in that package enclosed for your file. I have also attempted to find out the name of Ken Robertson's brother-in-law and his address. It is my understanding that his name is Wiley Mears, and his address is 300 Doris Mill Road, Carrollton, GA 30117.

I would also reiterate the Bar's position that we will be willing to await the Supreme Court's decision in your quo warranto proceeding as it impacts several of the cases which are presently pending against you in this office. However, I would still appreciate your assessing each of these cases assuming that the court again decides against you on this issue so that when the ruling by that court is made the cases will be in a posture to proceed forthwith.

Finally, concerning ASB 89-341, I have written Ms. Bearden inquiring as to whether her mother's house ever sold, and whether the estate has been concluded. Once I receive any response from her, I will likewise pass that information along to you.

Sincerely,

/s/ J. Anthony McLain
J. Anthony McLain
Assistant General Counsel

JAM/bm

Enclosure

McPhillips, Shinbaum & Gill
ATTORNEYS AND COUNSELORS AT LAW
516 SOUTH PERRY STREET
MONTGOMERY, ALABAMA 36104

TELEPHONE (205) 262-1911
FAX (205) 263-2321

November 14, 1994

Via Hand-Delivery

Honorable Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama
300 Dexter Avenue
Montgomery, Alabama 36104

Re: *Leon Garmon, Appellant v. Alabama State Bar, Appellee*
Appeals from the Disciplinary Board of the Alabama State Bar; **ASB-89-099; ASB-89-173; and ASB-89-341**

Dear Bob:

Enclosed please find a combined (1) "Application to Vacate Orders Dated August 5, 1994, and October 28, 1994; (2) Application to Reduce 180-Day Suspension to 45 Days to Run Concurrent with 1920598 ASB-90-775); (3) Application for Stay for Execution of Punishment in Attorney Disciplinary Proceedings Pending Filing and Determination of Appellant's Petition for Writ or [sic] Certiorari in the Supreme Court of the United States."

Please note that, with respect to ASB-89-099, for which a 180-day suspension was ordered, the Alabama State Bar was originally willing (as set forth in paragraph 6 of the enclosed) to offer "a public reprimand without general publication."

With respect to ASB-89-173, for which a 180-day suspension was ordered, the Alabama State Bar was originally willing to offer a "private reprimand."

With respect to ASB-89-341, for which a 90-day suspension was ordered, the Alabama State Bar initially appeared to treat it as a fairly minor matter, and, as set forth in paragraph 6(C) of the enclosed, "the client suffered no injury from Leon Garmon's delay in the sale of the property."

For all the reasons set forth, we would greatly appreciate the Alabama Supreme Court's considering either lifting the suspension altogether, or ordering the same to run concurrent with the 45-day suspension previously posed in another disciplinary matter, which is on appeal to the U.S. Supreme Court.

Thank you very much for your consideration in this regard.

Sincerely,
/s/ Julian McPhillips
Julian McPhillips

JLMcP:lh
Enclosure
x.c. Leon Garmon, Esq.
Tony McLain, Esq.

IN THE SUPREME COURT OF ALABAMA

1921761, 1921762, and 1921763

LEON GARMON,

APPELLANT

– VERSUS –

ALABAMA STATE BAR,

APPELLEE

APPEALS FROM THE DISCIPLINARY BOARD OF
THE ALABAMA STATE BAR
ASB-89-099, ASB-89-173, and ASB-89-341

FIRST AMENDMENT TO MOTION
TO
1) APPLICATION TO VACATE ORDERS DATED AUGUST 5, 1994, AND OCTOBER 28, 1994; 2) APPLICATION TO REDUCE 180-DAY SUSPENSION TO 45-DAY TO RUN CONCURRENT WITH 1920598 (ASB 90-775); 3) APPLICATION FOR STAY OF EXECUTION OF PUNISHMENT IN ATTORNEY DISCIPLINARY PROCEEDINGS PENDING FILING AND DETERMINATION OF APPELLANT'S PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES

(Filed Dec. 5, 1994)

COMES NOW the appellant, Leon Garmon, in the above-styled proceedings in this Court, by and through his undersigned counsel, and applies to and moves the

Court for a stay of the execution of the punishment imposed against appellant in these attorney disciplinary cases for a reasonable time to permit the appellant to file and have determined a petition for writ of certiorari in the Supreme Court of the United States for review of this Court's affirmance of the findings and discipline order by the Disciplinary Board of the Alabama State Bar, which said review by the Supreme Court of the United States would be meaningless if the punishment of appellant is carried out prior to his exercise of his right to seek certiorari in that Court.

For grounds and in support of this application, Leon Garmon, appellant, shows and represents unto the Court as follows:

23. Leon Garmon adopts by reference his original Motion to Vacate, filed on or about Monday, November 14, 1994, containing paragraphs 1 – 22, and consisting of eight (8) pages, along with attached *Exhibit "A,"* consisting of three (3) pages.

24. Leon Garmon's constitutional rights under the First, Eighth, and Fourteenth amendments to the United States Constitution were violated by the assignment of disciplinary charges to five (5) different disciplinary panels.

25. Leon Garmon filed a motion to consolidate all disciplinary cases to one disciplinary panel entitled "Respondent Leon Garmon's Motion for Dismissal or for Filing of Formal Charges and Motion to Consolidate All Pending Disciplinary Complaints and Charges," dated May 19, 1992. (See attached *Exhibit "1"*, consisting of 14 pages.)

26. Pursuant to Rule 42(a) of the *Alabama Rules of Civil Procedure,* made applicable to these proceedings by Rule 3(b) of the *Alabama Rules of Disciplinary Procedure,* respondent Leon Garmon moved the Disciplinary Board for an order consolidating all pending disciplinary charges and complaints against him, with said consolidation to be for all purposes including but not limited to scheduling, discovery, and final hearing.

27. Under Rule 13.3(a) and 13.3(c) of the Alabama Rules of Criminal Procedure, criminal charges are routinely consolidated for trial to maximize the Court's resources and minimize costs to the defendant.

28. On May 19, 1992, (See attached *Exhibit "1."*) Leon Garmon had requested that ASB-89-099; ASB-89-173; ASB-89-341 all be consolidated and assigned to Panel 1.

29. The custom, practice, and pattern of the Disciplinary Commission of the Alabama State Bar has been to assign *all* complaints and formal charges against an attorney to be heard by one (1) disciplinary panel, according to the affidavit of former Assistant Attorney General and former Assistant General Counsel John A. Yung, IV, dated September 28, 1992. Mr. Yung states in Paragraph Four (4), to-wit:

> "For a period of seven and one-half (7½) years, from 1970 to 1972, and 1974 to 1978), I served as an Alabama assistant attorney general."

30. Mr. Yung states in Paragraph Five (5), to-wit:

> "For a period of ten and one-half (10½) years, from 1980 to 1991, I was an assistant general counsel for the Alabama State Bar. A substantial

> part of my duties as assistant general counsel was to review disciplinary complaints against attorneys and make recommendations, on behalf of the Bar, to the Disciplinary Commission as to disposition of those complaints. After receiving my recommendation, the Disciplinary Commission would vote to dismiss the complaint with no disciplinary action, to impose private or public discipline, or direct that formal disciplinary charges be filed against the subject lawyer.

31. In Paragraph Eleven (11) of *Exhibit "A,"* Mr. Yung states,

> "In my experience as an assistant general counsel, I never saw the Bar oppose any consolidation of charges. Indeed, the Bar has generally sought to consolidate all charges against any one respondent lawyer, in order to have all those charges resolved in one proceeding, rather than spreading them out over time to different panels of the Disciplinary Board, at increased cost to both side."

32. There was, and still is, no legal basis for the Bar not agreeing to consolidate all disciplinary complaints concerning Leon Garmon.

WHEREFORE, premises considered, Leon Garmon applies to and moves the Court for the following relief, to-wit:

(A) a stay of the execution of the punishment of 180-day suspension imposed against appellant in these attorney disciplinary cases for a reasonable time to permit the appellant to file and have determined a petition for writ of certiorari in the Supreme Court of the United States for review of this Court's summary affirmance of

the findings and discipline ordered by the Disciplinary Board of the Alabama State Bar;

(B) a reduction of the 180-day suspension to 45 days to run concurrent with #1920598 (ASB 90-775);

(C) and for such other, further and general relief to which appellant may be entitled in the circumstances.

Respectfully submitted,

/s/ Julian L. McPhillips, Jr.
JULIAN L. MCPHILLIPS, JR.
McPhillips, Shinbaum & Gill
P.O. Box 64
Montgomery, AL 36101
(205) 262-1911

Attorney for Appellant

LIST OF ATTACHMENTS

Exhibit	Description
"1"	Fourteen (14) page Motion to Consolidate, dated May 19, 1992
"A"	Four (4) page Affidavit of John A. Yung, IV

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing application for stay on counsel of record for the appellee, whose name and address are listed below on this 5th day of December, 1994.

/s/ Julian McPhillips
Appellant's Attorney

* COUNSEL FOR APPELLEE

J. Anthony McLain, Esquire
Assistant General Counsel
Alabama State Bar
415 Dexter Avenue
Post Office Box 671
Montgomery, AL 36101
(205) 269-1515

EXHIBIT 1

BEFORE THE DISCIPLINARY BOARD
OF THE ALABAMA STATE BAR

IN THE MATTER OF LEON GARMON, AN ATTORNEY AT LAW OF THE STATE OF ALABAMA	)	ASB Nos.:
	)	(1) 89-81;
	)	(2) 89-099(A);
	)	(3) 89-148;
	)	(4) 89-173**;
	)	(5) 89-321**;
	)	(6) 89-341;
	)	(7) 89-409**;
	)	(8) 89-671(B);
	)	(9) 90-424;
	)	(10) 90-527;
	)	(11) 90-575;
	)	(12) 90-601(B);
	)	(13) 90-632**;
	)	(14) 90-758;
	)	(15) 90-775;
	)	(16) 90-900**;
	)	(17) 91-733**;
	)	(18) 92-063**;
	)	(19) 92-170**[1]

RESPONDENT, LEON GARMON'S MOTION FOR DISMISSAL OR FOR FILING OF FORMAL CHARGES AND MOTION TO CONSOLIDATE ALL PENDING DISCIPLINARY COMPLAINTS AND CHARGES

COMES NOW Leon Garmon, the respondent in the above-styled matters now pending before the Disciplinary Board, and requests that the general counsel of the Alabama

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**Indicates that an investigation is presently pending in the office of the general counsel regarding the designated complaint. As of the date of this motion, formal charges have not been filed regarding these complaints.

State Bar, within a reasonable period of time after the filing of this motion as determined by the chairman, *either* dismiss with prejudice and without action *or* file formal charges in all pending disciplinary matters regarding Leon Garmon, which said matters are believed to be the following:

(1) **ASB-89-173, dated March 24, 1989, complaint of Derryl D. Ogles (Kenneth P. Robertson, Jr. & others unknown to Garmon), that Leon Garmon deceived Cutchens into signing an acknowledgement/affidavit permitting Garmon to name Ogles as a plaintiff in an Etowah County Circuit Court declaratory judgment action, *Derryl Ogles, et al v. Ronald Higgins, et al.*, CV-88-552, challenging the authority and creation of the position of Etowah County domestic referee, in which all four Etowah County circuit judges were named as defendants[2];

(2) **ASB-89-321, dated May 30, 1989, complaint of Kenneth P. Robertson, Jr., regarding Leon Garmon's alleged solicitation of Robertson's clients, Debra Watts, Pete O'Dell and Jackie Lowery (now deceased), all of whom were Leon Garmon's clients, on May 22, 1989;

(3) **ASB-89-409, dated July 10, 1989, complaint of Darryl Askew regarding Leon Garmon's alleged solicitation of perjury in having his client, Gina Askew, the former wife of Darryl Askew, swear falsely in a verified divorce complaint about the parties' county of residence

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[2] A complaint regarding the same alleged misconduct was also filed by Ernest Burton Taylor (ASB-89-099(B)), one of the named plaintiffs in CV-88-552. The general counsel has dismissed that complaint without action due, apparently, to the extensive felony criminal record of Taylor.

in order to establish venue of the divorce action in Etowah County;

(4) **ASB-90-632, dated August 13, 1990, complaint of Kenneth P. Robertson, Jr., regarding Leon Garmon's alleged solicitation of Robertson's clients, Billy Fanchier, Joyce Fanchier and Joyce Marie Fanchier, all of whom were Leon Garmon's clients;

(5) **ASB-90-900, dated November 13, 1990, complaint of Kenneth P. Robertson, Jr., regarding Garmon's allegedly false representation as to the nature of the testimony given by Robertson in the Jefferson County Circuit Court trial of *Larry Brice Richards, et al. v. Lennox, Inc.*, CV-86-5063, in February 1990, in which Kenneth P. Robertson, Jr., testified for Lennox, over objection of Garmon, as a "fact" witness;

(6) **ASB-91-733, dated October 5, 1991, complaint of Alison Fordham Sims, regarding Leon Garmon's alleged failure to vigorously represent her in her third divorce action and that Garmon "abandoned" her as a client, specifically that Garmon did not obtain the award to her of the parties' mobile home and that Garmon did not insure and guarantee that her former spouse would not consume alcoholic beverages during his visitation with the parties' children, even though the lawyer she hired after Garmon's withdrawal did not accomplish those goals;

(7) **ASB-92-063, dated January 31, 1992, Rule 3(c), Ala.R.D.P., *ex mero motu* complaint of the Alabama State Bar regarding imposition of Rule 11, Fed.R.Civ.P., sanctions, particularly whether the imposition of Rule 11

sanctions against Leon Garmon for "frivolously" appealing the dismissal, on the grounds of *res judicata* and judicial immunity, the federal court case of *Bobby Hugh Tallant, et al. v. Ronald C. Higgins, et al.*, CV-90-AR-1578-M (N.D. Ala. 1992), is a violation of the *Code of Professional Responsibility;* and

(8) **ASB-92-170, dated March 24, 1992, complaint of Luther and Betty Marbury regarding Garmon's alleged failure to vigorously represent the Marburys in proceedings regarding the foreclosure of their house, for professional incompetence in allegedly giving legally incorrect advice regarding bankruptcy and foreclosure law, and for failing to seek the lawful objectives of the Marburys in preventing the foreclosure of their house.

LEON GARMON REQUESTS THAT ANY FORMAL CHARGES FILED IN ANY OF THE EIGHT (8) LISTED PENDING COMPLAINTS BE CONSOLIDATED WITH THE FORMAL CHARGES ALREADY FILED IN THE MATTERS LISTED BELOW.

FURTHER, pursuant to Rule 42(a) of the *Alabama Rules of Civil Procedure,* made applicable to these proceedings by Rule 3(b) of the *Alabama Rules of Disciplinary Procedure,* respondent Leon Garmon *moves the Disciplinary Board for an order consolidating all pending disciplinary charges and complaints* against him, said consolidation to be for all purposes including but not limited to scheduling, discovery and final hearing, and being the following, viz:

(1) ASB-89-81, dated February 8, 1989, complaint of Annette (Cattling) Coleman (Kenneth P. Robertson, Jr. &

others unknown to Garmon), that Leon Garmon allegedly withheld wages and salary due to be paid to Coleman, a former employee of Garmon, and that Garmon allegedly withheld and refused to pay to Coleman, Kenneth P. Robertson, Jr., and Rodney L. Ward, all former employees of Garmon, money they were due as participants in an ERISA pension and retirement plan of which Garmon was the fiduciary and administrator;

(2) ASB-89-099-(A), dated February 21, 1989, complaint of James Richard Cutchens (Kenneth P. Robertson, Jr. & others unknown to Garmon), that Leon Garmon allegedly deceived Cutchens into signing an acknowledgment/affidavit permitting Garmon to name Cutchens as a plaintiff in an Etowah County Circuit Court declaratory judgment action, *Derryl Ogles, et al v. Ronald Higgins, et al.*, CV-88-552, challenging the authority and creation of the position of Etowah County domestic referee, in which all four Etowah County circuit judges were named as defendants[3]

(3) ASB-89-148, dated March 10, 1989, complaint of Candyce Ponder (Kenneth P. Robertson, Jr. & others unknown to Garmon), that Leon Garmon allegedly assisted Michael Allsup, Garmon's law clerk, in the unauthorized practice of law by sending Allsup to a hearing before Judge Donald Stewart on Garmon's claim for a contract or *quantum meruit* attorney's fee for services

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[3] A complaint regarding the same alleged misconduct was also filed by Ernest Burton Taylor (ASB-89-099(B)), one of the named plaintiffs in CV-88-552. The general counsel has dismissed that complaint without action due, apparently, to the extensive felony criminal record of Taylor.

in Ponder's personal injury case, after Ponder had discharged Garmon and hired Robertson[4];

(4) ASB-89-173**, dated March 24, 1989, complaint of Derryl D. Ogles (Kenneth P. Robertson, Jr. & others unknown to Garmon), that Leon Garmon deceived Ogles into signing an acknowledgement/affidavit permitting Garmon to name Ogles as a plaintiff in an Etowah County Circuit Court declaratory judgment action, *Derryl Ogles, et al. v. Ronald Higgins, et al.*, CV-88-552, challenging the authority and creation of the position of Etowah County domestic referee, in which all four Etowah County circuit judges were named as defendants;

(5) ASB-89-321**, dated May 30, 1989, complaint of Kenneth P. Robertson, Jr., that Leon Garmon communicated with Robertson's clients (and Garmon's clients) Debra Watts, Pete O'Dell and Jackie Lowery (now deceased) who Garmon knew, at the time of the communication on May 22, 1989, were represented by Robertson;

(6) ASB-89-341, dated June 12, 1989, complaint of June Bearden, that Leon Garmon willfully neglected the matter of Bearden's mother's estate for a period of some

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[4] Michael Allsup pleaded guilty to and was publicly reprimanded for the unauthorized practice of law in the corresponding complaint against him in this case (ASB-89-268). Further, Allsup pleaded guilty to the unauthorized practice of law in ASB-90-601(A), the corresponding charge to that against Garmon in ASB-90-424 and ASB-90-601(B), *infra*. In those guilty pleas, which were accepted by the general counsel and the Disciplinary Commission, Allsup denied that Garmon had knowledge of the suspension of Allsup's license to practice law, and denied that Garmon had any knowledge of or participation in the unauthorized practice of law.

four months, that Garmon was rude to her, and that Garmon did not vigorously pursue Bearden's objective of having her mother placed in a nursing home;

(7) ASB-89-409**, dated July 10, 1989, complaint of Darryl Askew, that Garmon allegedly solicited his client, Gina Askew, Darryl Askew's former wife, to commit perjury by swearing falsely in a verified divorce complaint about the parties' county of residence in order to establish venue of the divorce action in Etowah County;;

(8) ASB-89-671(B), dated December 15, 1989, complaint of Sylvia Darlene Kilgore, that Garmon allegedly failed to diligently pursue for a period of time Kilgore's objective, following a divorce in which Garmon represented Kilgore, of recovering a knife and coin collection of nominal value from her former husband, even though the collection was recovered by Kilgore when she delivered some photographs to her former husband as part of the same bargain[5];

(9) ASB-90-424, dated May 31, 1990, complaint of Kenneth P. Robertson, Jr., that Leon Garmon allegedly assisted Michael Allsup, Garmon's law clerk, in the unauthorized practice of law by sending Allsup alone to sit at counsel table, though Allsup did not participate in any manner in the court proceedings, to a criminal preliminary hearing before Judge Wayne Owen in the case of *State of Alabama v. Steve Royal*, even though the client (Mr.

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[5] ASB-89-671(A) was apparently filed by Sylvia Darlene Kilgore against her former husband's divorce attorney, John D. McCord. The complaint against Mr. McCord was dismissed without action by the general counsel.

Royal), the prosecutor (Assistant District Attorney Cliff Callis) and the court (Judge Owen) agree that Allsup did nothing constituting the practice of law;

(10) ASB-90-527, dated July 9, 1990, Rule 3(c), Ala.R.D.P., *ex mero motu* complaint of Alabama State Bar regarding direct contempt citation by Judge Julius S. Swann, that Leon Garmon was allegedly disrespectful and insulting to Judge Swann, and make unfounded accusations of impropriety against Judge Swann, by filing and urging a motion to recuse directed to Judge Swann in a criminal matter (*State of Alabama v. Terry M. Alford*, CC-88-722-JSS (Etowah Co.);

(11) ASB-90-575, dated July 21, 1990, complaint of attorney Rowan S. Bone, that Leon Garmon maliciously and without good cause to do so filed a counterclaim against Bone for fraud and legal malpractice in a fee collection lawsuits commenced by Bone against Bone's former (and Garmon's present) client, James Estes; and that Garmon maliciously and without probable cause filed a malicious prosecution lawsuit against Bone for Bone's earlier fee collection lawsuit against Louis Adams (now deceased);

(12) ASB-90-601(B), dated June 21, 1990, complaint of Etowah County assistant district attorney Cliff Callis, that Leon Garmon allegedly assisted Michael Allsup, Garmon's law clerk, in the unauthorized practice of law by sending Michael Allsup to negotiate and consummate a guilty plea before Judge Wayne Owen for in the misdemeanor case of *State of Alabama v. Mary Helen Allred;*

(13) ASB-90-632 **, dated August 13, 1990, complaint of Kenneth P. Robertson, Jr., that Leon Garmon

communicated with Robertson's clients (and Garmon's clients) Billy Fanchier, Joyce Fanchier and Joyce Marie Fanchier, who Garmon knew, at the time of the communication, were represented by Robertson;

(14) ASB-9-758, dated October 1, 1990, complaint of Ruby Jewell Wagner, that Leon Garmon, without Wagner's full and informed consent, represented Charles and Bonnie Sauls, who had been sued by Wagner in Etowah County District Court, at the same time Garmon represented Wagner in a chapter 7 bankruptcy proceeding, and that Garmon used information acquired during the course of representing Wagner against her in defending the Sauls's against Wagner's district court lawsuit;

(15) ASB-90-775, dated October 10, 1990, complaint of Judge Julius S. Swann, Jr., that Leon Garmon was allegedly disrespectful and insulting to Judge Swann, and made unfounded accusations of impropriety against Judge Swann, by filing and urging a motion to recuse directed to Judge Swann in four (4) divorce, contempt or divorce modification actions pending before Judge Swann[6];

(16) ASB-90-900 **, dated November 11, 1990, complaint of Kenneth P. Robertson, Jr., that Garmon allegedly falsely represented the nature of the testimony given by

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[6] The motion to recuse is, in its essential allegations, the same as that which forms the basis of ASB-90-527, *supra*. The four (4) divorce cases in which the motion to recuse was filed were *Roger S. Farrow v. Janie Farrow*, DR-74-27, 259.02-C; *Carey Lea Lister v. Tony Lee Lister*, DR-90-322-JSS; *Peggy Lee Isbell v. Randel Dewitt Isbell*, DR-88-513.01-JSS; and *Aleta Renee Woods v. Richard David Woods*, DR-90-217-JSS.

Robertson in the Page 9 of 14 Jefferson County Circuit Court trial of *Larry Brice Richards, et al. v. Lennox, Inc.*, CV-86-5063, in February 1990, in such a manner as to impute that Robertson's testimony violated a disciplinary rule of the *Code of Professional Responsibility of the Alabama State Bar;*

(17) ASB-91-733 **, dated October 5, 1991, complaint of Alison Fordham Sims, that Leon Garmon allegedly failed to vigorously represent her in Mrs. Sims' divorce action and that Garmon "abandoned" her as a client, specifically that Garmon did not obtain the award to her of the parties' mobile home and that Garmon did not insure and guarantee that her former spouse would not consume alcoholic beverages during his visitation with the parties' children, even though the lawyer she hired after Garmon's withdrawal did not accomplish those goals;

(18) ASB-92-063 **, dated January 31, 1992, Rule 3(c), Ala.R.D.P., *ex mero motu* complaint of the Alabama State Bar regarding imposition of Rule 11, Fed.R.Civ.P., sanctions, particularly that the imposition of Rule 11 sanctions against Garmon for "frivolously" appealing the dismissal, on the grounds of *res judicata* and judicial immunity, the federal court case of *Bobby Hugh Tallant, et al. v. Ronald C. Higgins, et al.*, CV-90-AR-1578-M (N.D. Ala. 1992), is a *per se* violation of the *Code of Professional Responsibility;* and

(19) ASB-92-170 **, dated March 24, 1992, complaint of Luther and Betty Marbury, that Garmon allegedly failed to vigorously represent the Marburys in proceedings regarding the foreclosure of their house, that he rendered professionally incompetent advise regarding

bankruptcy and foreclosure law, and that Garmon failed to seek the lawful objectives of the Marburys in preventing the foreclosure of their house.

For grounds and in support of this motion to consolidate, Leon Garmon says as follows:

1. To the best of Garmon's knowledge, information and belief, the above designated and described actions are all the disciplinary matters now pending against Leon Garmon before the general counsel, the Disciplinary Commission or the Disciplinary Board of the Alabama State Bar. The following complaints against Garmon have been investigated and dismissed upon a finding of no violation by the general counsel prior to the commencement of these proceedings:

(a) ASB-89-339(c), dated June 7, 1989, complaint of Glenn D. McDuffie, dismissed on January 29, 1990;

(b) ASB-90-023, dated January 9, 1990, complaint of Charlotte Spurling, client of Kenneth P. Robertson, Jr., dismissed on April 19, 1990;

(c) ASB-90-922, dated November 20, 1990, complaint of Patricia Ann Reavis, client of Kenneth P. Robertson, Jr., dismissed on August 16, 1991;

(d) ASB-90-221, dated March 13, 1990, complaint of David Finney, dismissed on December 14, 1990;

(e) ASB-85-656, dated November 25, 1985, complaint of Myron Allenstein, dismissed on January 8, 1992;

(f) ASB-89-099(B), dated June 21, 1989, complaint of Ernest Burton Taylor, client of Kenneth P. Robertson, Jr., dismissed on August 16, 1991; and

2. The pending nineteen (19) different disciplinary matters, as they are presently filed, will necessitate at least five (5) to eight (8) separate hearings by this panel at different times. The trial of these complaints, if held separately, would consume at least three (3) days each, and would result in a substantial interference in the daily activities of the witnesses, the panel members and the respondent.

3. The majority of the pending complaints, as noted above, arise from allegations made by either Judge Julius S. Swann, Jr., or attorney Kenneth Paul Robertson, Jr.

4. There is no legitimate reason for having separate trials on each set of formal charges, and efficiency and conservation of the resources of all the participants requires consolidation of the proceedings for all future purposes.

5. There will no conceivable prejudice to the Alabama State Bar if these proceedings are consolidated.

6. Many of the witnesses on the merits, and most if not all of the witnesses to be presented by the respondent in extenuation and mitigation of punishment in the event of a conviction, will be the same in all the pending actions.

7. It would impose an intolerable burden on Leon Garmon's witnesses for them to appear at as many as eight (8) different hearings, when their testimony could be easily and efficiently taken in one proceeding for disposition of all the pending charges and complaints against Leon Garmon.

WHEREFORE, premises considered, respondent Leon Garmon moves the Disciplinary Board as follows:

(1) To require the general counsel of the Alabama State Bar, within a reasonable time after the filing of this motion, to *either* dismiss with prejudice and without action, *or* file formal disciplinary charges against Leon Garmon in all those complaints now under investigation in the office of said general counsel as aforesaid[7]; and

(2) To consolidate for all purposes, including scheduling, discovery and trial, all disciplinary charges now pending against Leon Garmon.[8]

LEON GARMON REQUESTS THAT ORAL ARGUMENT ON THESE MOTIONS BE HEARD AT THE PRE-TRIAL CONFERENCE IN ASB-90-527 & ASB-90-775 SET FOR WEDNESDAY, MAY 20, 1992, AT 10:00 A.M.

/s/ Leon Garmon
LEON GARMON
Respondent Pro Se
945 Forrest Avenue
Gadsden, Alabama 35901
(205) 543-3401

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[7] These complaints, pending investigation by the general counsel, are (1) ASB-89-321, (2) ASB-90-409, (3)ASB-90-632, (4) ASB-90-900, (5)ASB-91-733, (6) ASB-92-063 and (7) ASB-92-170.

[8] All the pending complaints and formal charges are: (1) ASB-89-81; (2) ASB-89-099(A); (3) ASB-89-148; (4) ASB-89-173; (5) ASB-89-321; (6) ASB-89-341; (7) ASB-89-409; (8) ASB-89-671(B); (9)ASB-90-424; (10) ASB-90-527; (11) ASB-90-575; (12) ASB-90-601(B); (13) ASB-90-632; (14) ASB-90-758; (15) ASB-90-775; (16) ASB-90-900; (17) ASB-91-733; (18) ASB-92-063; and (19) ASB-92-170.

CERTIFICATE OF FILING & SERVICE

I certify that I have filed the original of the above with the executive director of the Alabama State Bar, and that I have served a copy of the foregoing upon the chairman of Disciplinary Board Panel I, the general counsel of the Alabama State Bar, all listed below, by placing same in the United States mail properly addressed and first-class postage prepaid, this 19th day of May, 1992.

/s/ Leon Garmon
LEON GARMON

* Reginald T. Hamner, Esquire
Executive Director
Alabama State Bar
Post Office Box 671
Montgomery, Alabama 36101

* A. J. Coleman, Esquire
Acting Chairman
Disciplinary Board Panel I
Post Office Box 1685
Decatur, Alabama 35602

* J. Anthony McLain, Esquire
Assistant General Counsel
Alabama State Bar
1019 South Perry Street
Montgomery, Alabama 36104

EXHIBIT A

BEFORE THE DISCIPLINARY BOARD
OF THE ALABAMA STATE BAR

IN THE MATTER OF LEON GARMON, AN ATTORNEY AT LAW OF THE STATE OF ALABAMA	CASE NUMBERS: ASB-90-527, ASB-90-775
STATE OF ALABAMA MONTGOMERY COUNTY	

AFFIDAVIT OF JOHN A. YUNG, IV

Before me, the undersigned Notary Public for the State of Alabama at-Large, personally appeared JOHN A. YUNG, IV, who is known to me and who, being first duly sworn, does depose and say as follows:

1. My name is John A. Yung, IV. I do solemnly swear that the following statements are true and correct in every particular.

2. I give this affidavit in lieu of personally appearing at the final hearing in these disciplinary matters, ASB-90-527, ASB-90-775 and ASB-90-632, on Thursday, October 1, 1992, and Friday, October 2, 1992. I have a schedule conflict on those dates and I cannot be present in Gadsden to testify personally.

3. I am a lawyer and a member in good standing of the Alabama State Bar.

4. For a period of seven and one-half (7½) years, from 1970 to 1972 and 1974 to 1978, I served as an Alabama assistant attorney general.

5. For a period of ten and one-half (10½) years, from 1980 to 1991, I was an assistant general counsel for the Alabama State Bar. A substantial part of my duties as assistant general counsel was to review disciplinary complaints against attorneys and make recommendations, on behalf of the Bar, to the Disciplinary Commission as to disposition of those complaints. After receiving my recommendation, the Disciplinary Commission would vote to dismiss the complaint with no disciplinary action, to impose private or public discipline, or direct that formal disciplinary charges be filed against the subject lawyer.

6. If the Disciplinary Commission directed the general counsel to file formal disciplinary charges, I would then prosecute the charges against the lawyer at a final hearing or trial before a panel of the Disciplinary Board.

7. In the course of my employment as assistant general counsel of the Alabama State Bar, I was required to become familiar with the disciplinary rules, ethical considerations and canons of the Code of Professional Responsibility of the Alabama State Bar, as well as the decisions of the Alabama Supreme Court and other state and federal courts' interpretations of particular provisions of the disciplinary rules, ethical considerations and canons of the Code of Professional Responsibility.

8. During the course of my ten and one-half (10½) years' employment as assistant general counsel of the Alabama State Bar, I reviewed hundreds of complaints or

grievances against Alabama lawyers. I acted as prosecutor for the Alabama Bar against lawyers whose conduct resulted in filing of formal disciplinary charges in many cases.

9. I participated in seminars and short courses on the provisions of the Code of Professional Responsibility throughout the state to Alabama lawyers, and I worked with the Code of Professional Responsibility on a daily basis.

10. My opinion is that a motion to recuse may necessarily contain matters that may be offensive or upsetting to the judge who is the subject of that motion. Barring a full hearing, the only practical way that denial of a motion to recuse can be successfully preserved for appeal is to set out in the motion to recuse all the grounds and factual averments supporting the judge's recusal. My opinion is that such allegations, while they may be offensive to the judge's sensibilities, if made with the good faith and reasonable belief that they were true, do not amount to unethical conduct.

11. In my experience as an assistant general counsel, I never saw the Bar oppose any consolidation of charges. Indeed, the Bar has generally sought to consolidate all charges against any one respondent lawyer, in order to have all those charges resolved in one proceeding, rather than spreading them out over time to different panels of the Disciplinary Board, at increased cost to both sides.

12. This affidavit consists of four (4) pages, including this page.

FURTHER THIS AFFIANT SAYETH NOT

/s/ John A. Yung, IV
JOHN A. YUNG, IV

STATE OF ALABAMA)
) ss.
MONTGOMERY COUNTY)

Sworn to and subscribed before me by JOHN A. YUNG, IV, who is known to me, and who, on his oath, says that the foregoing statements are true and correct, this 28th day of September, 1992, at Montgomery, Montgomery County, Alabama.

/s/ Lucille Howard
NOTARY PUBLIC

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of *Southern Reporter*. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 445 Dexter Avenue, Montgomery, Alabama 36130 ((205) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in *Southern Reporter*.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1990-91

1900644

Ex parte Leon Garmon

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Released Jun. 14, 1991)

(Re: Leon Garmon v. State)

(Etowah Circuit Court, CC-88-382.01 and 382.02)

PER CURIAM.

Leon Garmon, a lawyer, represented Terry Alford in a felony criminal case. Terry Alford's case went to trial on June 11, 1990. In a pre-trial motion to recuse, Garmon suggested that the trial court was biased against Terry Alford and that the trial court had conspired to violate Terry Alford's civil rights. The trial court denied the motion to recuse. On June 13, 1990, when the jury retired to deliberate on its verdict in that case, the trial court held Garmon in direct contempt of court for his remarks made

during the pre-trial motion to recuse and sentenced him to serve six hours in jail. Still on June 13, after the jury had returned a verdict of not guilty in Alford's case, Garmon was incarcerated for two and one-half hours for that direct contempt; then he posted bond and was released. The Court of Criminal Appeals affirmed the trial court's judgment.

Section 12-1-8, Ala. Code 1975, provides when courts may inflict summary punishment[1] for contempt, and it provides in pertinent part:

> "The powers of the several courts in this state to issue attachments and inflict summary punishment for contempts shall not extend to any other cases than:
>
> > "(1) Disrespectful, contemptuous or insolent behavior in court, tending in any way to diminish or impair the respect due to judicial tribunals or to interrupt the due course of trial;"

Concerning direct contempt, we have recently stated:

> "Direct contempts are those committed in the judge's presence, where all of the essential elements of the contempt are under the eye of the court, and are actually observed by the court. In a direct contempt case, the judge can

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[1] "Summary" punishment does not refer to the timing of the punishment, but, rather to imposition of punishment without the formal procedures normally involved with criminal actions. See Rychlak, *Direct Criminal Contempt and the Trial Attorney: Constitutional Limitations on the Contempt Power* 14:2 American Journal of Trial Advocacy 243 (1990).

summarily and instantaneously find the person to be in contempt."

State v. Thomas, 550 So.2d 1067, 1072 (Ala. 1989).[2]

Garmon argues that the judgment of the Court of Criminal Appeals is due to be reversed on two grounds: 1) that the substance of his remarks was not contemptuous and 2) that the delay between his remarks and the trial court's holding of direct contempt rendered a finding of direct contempt inappropriate in this case. As to Garmon's first ground, although we do not so hold, because we resolve the case based on Garmon's second allegation of error, after reviewing the particular facts of this case we would be inclined to hold that the substance of Garmon's numerous, unsubstantiated claims made against the trial court, which observed his demeanor while he made those claims, could properly subject Garmon to summary punishment for direct contempt.[3]

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[2] The law of contempt is now generally set out in Rule 33, Ala. R. Crim. P., effective January 1, 1991.

[3] Garmon made the following remarks:

"The purpose of the motion I'm now about to put before the Court is that on behalf of Mr. Alford there is no way that we feel that the Court can be in a position to try this case for several reasons: first of all, the pending civil suit in Federal court is still pending. Second, we would expect and would proffer and tell the Court that one of our defenses – as a part of our defense [is] going to be that this is a case that was disposed of and that part of our defense is going to be, we expect to show . . . that this is a politically motivated and politically induced situation where Mr. Alford's employment as shop manager, shop foreman for the former County Commissioner Mr. Wendell Bryant, that after Mr. Bryant was defeated by the incumbent, the man that now presently is holding that office, Mr. Bull Smith, . . . made some

As to Garmon's argument that the time lapse between his remarks and the trial court's holding of

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statements to Mr. Alford that he did not want him running his shop anymore. . . .

". . . .

" . . . Mr. Alford, we would also expect the testimony to show, is going to testify that Mr. Bull Smith has told him on several occasions that he does not want a whistleblower or someone like him in his employment and that as a result of that we have our hearing – and that's Defendant's Exhibit 7 – and the agreement that I would expect to call His Honor as a witness in this case along with Mr. Pitts [the assistant district attorney], if necessary, to show that the agreement was made and it speaks for itself, and, of course, the court order [that] was entered as a result of that speaks for itself but that after that motion was filed by me to have the case dismissed . . . that there was a meeting between His Honor and Mr. Bull Smith in which Mr. Bull Smith convinced the Court that this case should not be dismissed.

". . . .

" . . . We will show that change of the mind took place after a meeting between Mr. Bull Smith and representatives of Mr. Bull Smith with the Court and that this ex parte or outside meeting resulted in the Court informing me that my motion was not well taken, that you had, quote, changed your mind. So, from our standpoint there is no way that this Court and this Judge can sit and hear this case based on facts and evidence as we expect to present them. . . .

". . . .

" . . . And we're making this offer most of which is a matter of written records and documents but we would expect to call the Court and call Mr. Bull Smith as witnesses – factual witnesses based on facts and circumstances that happened to show that this case has no basis or no merit but that only that even after there was an agreement that the case would be dismissed that the continuation of the case was only after we had some ex parte communications that resulted in this case being put back on the docket and . . . we . . . [n]ow tell the Court that we just do not see any way that this Court can sit and hear this case and act

direct contempt rendered direct contempt inappropriate, we note that in certain circumstances, particularly where the offender is a lawyer representing a client on trial, the summary punishment associated with direct contempt can properly be postponed until the conclusion of the proceedings. *Taylor v. Hayes*, 418 U.S. 488, 498 (1974).

However, as the United States Supreme Court also noted in *Taylor*, at 497, "the usual justification of necessity [for summary punishment] . . . is not nearly so cogent when final adjudication and sentence are postponed until after trial." Furthermore, although the allegedly contemptuous behavior occurred on June 11, the trial court did not, until June 13, give Garmon any notice that it had determined that he was in direct contempt and thereby subject to summary punishment. As *Taylor* says, "where punishment and conviction [for direct contempt] are delayed, 'it is much more difficult to argue that action without notice of hearing of any kind is necessary to preserve order and enable [the court] to proceed with its business.' " 418 U.S. at 498. This Court has stated, "Summary procedures, designed to punish direct contempts, are utilized to fill the need for immediate penal vindication of the dignity of the court." *In re Tarpley*, 293 Ala. 137, 142, 300 So.2d 409 (1974).

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as a trial judge at the same time that a Federal civil rights suit is pending on behalf of Mr. Alford against this Court and the district attorney in their official capacities, not individual capacities, but in their official capacities as the district attorney and as the circuit judge before whom this case is assigned and, further for the reasons that the Court would be called upon as a factual witness."

Under the facts of this case, considering not only the time lapse between Garmon's allegedly contemptuous conduct and the trial court's holding of direct contempt but also the trial court's complete failure over that time to notify Garmon of its determination that he was in direct contempt of court, we hold that the Court of Criminal Appeals erred in affirming the trial court's judgment of direct contempt. The judgment is due to be reversed and a judgment rendered in favor of the defendant.

REVERSED AND JUDGMENT RENDERED.

Maddox, Houston, Steagall, Kennedy, and Ingram, JJ., concur.

Adams, J., concurs in the result.

Canon 1.

A judge should uphold the integrity and independence of the judiciary.

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

DERRYL D. OGLES, et al.,	+	IN THE CIRCUIT COURT OF
PLAINTIFFS,	+	
VS.	+	ETOWAH COUNTY
RONALD HIGGINS, et al.,	+	ALABAMA
DEFENDANTS.	+	CIVIL ACTION NUMBER:
	+	CV-88-552-JSS

AFFIDAVIT OF JAMES RICHARD CUTCHENS

Before me, the undersigned Notary Public, personally appeared James Richard Cutchens who, after being duly sworn doth depose and states under oath as follows, to-wit:

My name is James Richard Cutchens. I am presently a party to a Domestic Relations case (Case Number DR-88-403-DWS) pending in the Circuit Court of Etowah County, Alabama. I have read the foregoing Complaint for Declaratory Judgment and/or Writ of Prohibition and/or Petition for a Temporary Restraining Order Regarding the Judicial Authority of the Domestic Referee for the 16th Judicial Circuit, consisting of forty (45 J.R.C.) pages.

I hereby acknowledge that I have authorized my Attorney, Leon Garmon to file this action on my behalf. I have read that portion of said Complaint that pertains to my pending Domestic Relations Action and hereby

acknowledge that it is true and correct to the best of my knowledge, information and belief.

/s/ James Richard Cutchens
JAMES RICHARD CUTCHENS,Affiant

Sworn to and subscribed before me
on this the 26 day of July, 1988.

/s/ Luann Lee
NOTARY PUBLIC

MARTHA E. WILLIAMS, ET AL	*	IN THE CIRCUIT COURT OF
PLAINTIFFS	*	ETOWAH COUNTY, ALABAMA
VS.	*	
RONALD HIGGINS, ET AL,	*	CIVIL ACTION NO.:
DEFENDANTS	*	CV-88-552-JSS

AFFIDAVIT OF LUANN LEE CONCERNING AFFIDAVIT OF JAMES RICHARD CUTCHENS

STATE OF ALABAMA
ETOWAH COUNTY

Before me, the undersigned Notary Public in and for said County and State, personally appeared Luann Lee who, after being duly sworn, deposes and says as follows:

On Tuesday, July 26, 1988 Mr. James Richard (Ricky) Cutchens was in Leon Garmon's Law Office for the purpose of signing an Affidavit authorizing Leon Garmon to file suit on his (Mr. Cutchens') behalf against Ronald Higgins, Domestic Referee, and the four (4) Circuit Judges of Etowah County.

I recall that Mr. Cutchens was located in our kitchen when he signed his Affidavit. This was due to the fact that our conference rooms were filled there were so many clients in our office that day, many of them being some of the other plaintiffs in this action.

After Mr. Garmon had talked with Mr. Cutchens and gave him ample opportunity to read the complaint (consisting of approximately forty-four (44) pages) and his one (1) page affidavit I then witnessed Mr. Cutchens

signing his Affidavit authorizing Mr. Garmon to file CV-88-552-JSS on Mr. Cutchens' behalf. Mr. Cutchens had no questions about his Affidavit or the complaint and did not hesitate to sign his Affidavit. To the best of my recollection Mr. Garmon left the room and was not present when Mr. Cutchens signed his affidavit.

I also witnessed the Affidavits of Leonard Williams and Jason Wayne Grubbs. The same procedure was followed whereby each client was given ample opportunity to read the complaint and their Affidavit before signing their Affidavit.

I am giving this affidavit at Mr. Garmon's request. I initially prepared the substance of this affidavit. Mr. Garmon assisted me in putting this affidavit. Mr. Garmon then assisted me in putting this affidavit in proper form.

DONE this 16 day of June, 1989

/s/ Jeanne B. O'Lear 6/16/89
WITNESS DATE

/s/ Luann Lee 6-16-89
LUANN LEE

Sworn to and subscribed before me on this 16 day of June, 1989.

/s/ Caren Reynolds
NOTARY PUBLIC

DERRYL D. OGLES, et al.,	+	IN THE CIRCUIT COURT OF
PLAINTIFFS,	+	ETOWAH COUNTY
VS.	+	ALABAMA
RONALD HIGGINS, et al.,	+	CIVIL ACTION NUMBER:
DEFENDANTS.	+	CV-88-552-JSS

AFFIDAVIT OF DERRYL D. OGLES

Before me, the undersigned Notary Public, personally appeared Derryl D. Ogles who, after being duly sworn doth depose and states under oath as follows, to-wit:

My name is Derryl D. Ogles. I am presently a party to a Domestic Relations case (Case Number DR-87-810-JSS) pending in the Circuit Court of Etowah County, Alabama. I have read the Complaint for Declaratory Judgment and/or Writ of Prohibition and/or Petition for a Temporary Restraining Order Regarding the Judicial Authority of the Domestic Referee for the 16th Judicial Circuit, consisting of forty (40) pages.

I hereby acknowledge that I have authorized my Attorney, Leon Garmon to file this action on my behalf. I have read that portion of said Complaint that pertains to my pending Domestic Relations Action and hereby

acknowledge that it is true and correct to the best of my knowledge, information and belief.

/s/ Derryl Ogles
DERRYL D. OGLES, Affiant

Sworn to and subscribed before me
on this the 26th day of July, 1988.

/s/ Mary Kristina Cash
NOTARY PUBLIC

MARTHA E. WILLIAMS, ET AL	*	IN THE CIRCUIT COURT OF
PLAINTIFFS	*	ETOWAH COUNTY, ALABAMA
VS.	*	CIVIL ACTION NO.:
RONALD HIGGINS, ET AL,	*	CV-88-552-JSS
DEFENDANTS	*	

AFFIDAVIT OF MARY KRISTINA (TINA) CASH
CONCERNING AFFIDAVIT OF DERRYL D. OGLES

STATE OF ALABAMA
ETOWAH COUNTY

Before me, the undersigned Notary Public in and for said County and State, personally appeared Mary Kristina (Tina) Cash who, after being duly sworn, deposes and says as follows:

On July 26, 1988, Mr. Derryl D. Ogles was in Mr. Garmon's office to sign an Affidavit authorizing Mr. Garmon to include him as a Plaintiff in a lawsuit against the Domestic Referee, Ronald Higgins and the four (4) Circuit Judges of Etowah County.

Mr. Ogles was taken into Mr. Garmon's office and given a copy of the complaint (consisting of approximately forty-four (44) pages) and his one (1) page affidavit to read over. When I witnessed Mr. Ogles' signature he had no questions nor did he indicate he did not understand what he was signing. I remember Mr. Garmon had already spoken with Mr. Ogles because Mr. Garmon is the one who called me into his office to let me know Mr. Ogles was ready to sign his Affidavit authorizing Mr. Garmon to file CV-88-552 on Mr. Ogles' behalf. To the best of my recollection Mr. Garmon left the room and was not present when Mr. Ogles signed his affidavit.

I also witnessed the following affidavits in which the same procedure was used as Mr. Ogles, to-wit: Ernest Taylor, Martha Williams, Michael Mitchell, Harold Haley, Bobby Tallant and Deborah Eagly.

I am giving this affidavit at Mr. Garmon's request. I initially prepared the substance of this affidavit. Mr. Garmon assisted me in putting this affidavit in proper form.

DONE this 16 day of June, 1989.

/s/ Bonnie F. Warner 6-16-89
WITNESS DATE

/s/ Mary Kristina Cash 6/16/89
MARY KRISTINA CASH

Sworn to and subscribed before me on this 16 day of June, 1989.

/s/ Caren Reynolds
NOTARY PUBLIC

IN THE SIXTEENTH JUDICIAL CIRCUIT OF ALABAMA

DEBORAH CUTCHENS,	*	
	*	
PLAINTIFF	*	
VS	*	NO. CV-88-403DWS
	*	
JAMES RICHARD CUTCHENS,	*	
	*	
DEFENDANT	*	

PROCEEDING HAD BEFORE THE HONORABLE DONALD W. STEWART, CIRCUIT JUDGE OF THE SIXTEENTH JUDICIAL CIRCUIT OF ALABAMA, GADSDEN, ALABAMA ON SEPTEMBER 9, 1988.

[R-2] SEPTEMBER 9, 1988 2:20 PM

PROCEEDINGS

THE COURT: We are here on a motion filed by the defendant in this case, Deborah Cutchens, vs James Richard Cutchens, CV-88-403.

Have you got the style, Doyle?

COURT REPORTER: Yes, sir.

THE COURT: We are here to get – on a motion to have the trial Judge recuse in this case, and I want to give the defendant an opportunity to present whatever information you would like to.

JAMES RICHARD CUTCHENS, CALLED AS A WITNESS IN HIS OWN BEHALF, AFTER BEING DULY SWORN, TESTIFIED FOLLOWS:

DIRECT EXAMINATION BY MR. GARMON:

Q State you [sic] full name, Mr. Cutchens.

A James Richard Cutchens.

Q And you are known by, have a nickname of "Rickie?"

A Yes, sir.

Q Your age and residence address?

A 33 years of age, and I live at 428 Lake Street, East Gadsden.

Q Here in Etowan [sic] County?

[R-3] A Yes, sir.

Q And are you married to Deborah Cutchens?

A Yes, sir.

Q How long have y'all been married?

A Ten and a half years.

Q Been a resident here in Etowah County, both of you, for the last six months, or more?

A Yes, sir.

Q Mr. Cutchens, you joined in as one of ten people in a declaratory judgment-type suit naming the master referee and the four circuit Judges and A.O.C., did you not?

A Yes, sir.

Q And prior to, and during the course of discussion I had with you about filing this suit and being one [sic]

the ten plaintiffs, tell me what concern you had at that point that if you joined what affect [sic] you felt it might have on the Judges that you're named as defendant in the case?

A Well, my own feeling was that after I filed a lawsuit or filed a suit, that it would be hard for a Judge to have – the best word for it, I believe, would be not a one sided opinion toward it. I feel like, really, that if he did, – if a Judge did in this county, that he would have a one [R-4] sided opinion of it.

Q Did you express that concern to me –

A Yes, sir.

Q – at the time we were preparing the suit?

A Yes, sir.

Q Did I tell you that we would file what we call a motion to recuse, something asking all of the trial Judges here in Etowah County who are named defendants to excuse themselves or recuse themselves?

A Yes, sir.

Q And on the basis of the motion being filed, a motion to recuse his self, you wanted to be one of the ten plaintiffs in the case.

A Yes, sir.

Q Now, at this point in time since the suit has been filed, has anything happened that would change your mind?

A No, sir.

Q Have you got any personal – let me put it this way. There is nothing personal between – in your suit and the declaratory judgment action against Judge Stewart or any other of the Judges, is there?

A No, sir, huh uh.

[R-5] Q As I explained to you, its [sic] a question of law as to whether the master referee is in a qualified position to hear domestic relation cases.

A True.

Q But also, because of the fact that Judge Stewart, along with all of his colleagues voted to put the master referee is in that position that they needed to be named as a party to it since they were the ones that either come up with the plan or went along with it.

A Yes, sir.

MR. GARMON: That's all I've got. Mr. Millican may have some questions.

CROSS EXAMINATION BY MR. MILLICAN:

Q Mr. Cutchens, how long has it been now since you were served with the divorce partition?

A June the 8th: I don't know how long, that was June the 8th that I –

Q June the 8th?

A Uh huh.

Q And during that time there has been no forum wherein you and your wife have come before this Court in any manner, is there?

A No, sir.

Q There has been no order that you would pay [R-6] child support, or any maintenance for your wife or children –

MR. GARMON: We would object. It is not the purpose of today's hearing. If he wants to get into that, he can. She took about thirty-six hundred dollars money –

MR. MILLICAN: Your Honor, if Mr. Garmon [sic] going to testify we want to swear him in.

MR. GARMON: I'd be glad to testify that that is what he told –

MR. MILLICAN: That is hearsay, Your Honor. That is not firsthand personal –

MR. GARMON: Well, he is the one ask it, though, Judge.

MR. MILLICAN: I asked him if he was sworn in, Your Honor, I didn't ask him to give testimony –

MR. GARMON: I will be glad to get sworn in –

THE COURT: Just a minute, gentlemen, one at a time. Go ahead.

MR. MILLICAN: If I may continue my line of questioning, Your Honor, I will make it very brief.

MR. GARMON: Judge, we object. [R-7] That is not the purpose of – today's hearing, specifically, set for –

MR. MILLICAN: I will withdraw the last question, Your Honor, if I may be allow [sic] to continue.

THE COURT: Yes, sir.

Q Mr. Cutchens, have you ever been before Judge Stewart before?

A No, sir.

Q Have you ever met him before?

A No, sir.

Q Have you ever filed any action and had him rule either against you or for you in any manner whatsoever?

A No, sir.

Q The thrust of your lawsuit that was filed was dealing specifically with domestic referee and whether he should or should not hear the pendente lite hearing prior to coming into court for the final hearing, is that correct?

A Yes, sir.

Q Have you got any other reason for being involved in that case other than the particular issue of the domestic referee?

A Not to my knowledge, sir.

[R-8] MR. MILLICAN: I have no further questions.

And if it please the Court, at this time I would like to move for the Court to withdraw any motions which have previously been filed to have a hearing before the domestic referee. Therefore, in my opinion, it would make the issue of Mr. Cutchens' involvement in the lawsuit moot and we would move to have this set down for a final hearing so that we may get on with this lady's life and get her some type of relief which she is entitled to by law.

We have heard nothing other than the particular issue dealing with the domestic referee that would in any way prejudice you from hearing the case. And if that particular issue is removed we find no reason, or our opinion would be that there is no reason why you should not be able to hear this case.

That's all I have.

THE COURT: Anything else?

MR. GARMON: Do you have any questions of Mr. Cutchens?

THE COURT: I do not. Let me – go ahead, Mr. Cutchens.

[R-9] (Witness excused)

THE COURT: For point of record, counsel indicated that all four of the Circuit Judges had voted to create the position of court referee. Of course, in my particular case that is not correct. That position was created before I took the bench.

MR. GARMON: I think I made the statement either when it was formed or either along with it, and maybe I should say a reappointment situation, you passed on the reappointment after you took the bench.

THE COURT: No, sir, for the record, I have never voted to reappoint anyone in that position.

I think it has been demonstrated, of course, that this is a declaratory judgment suit. My personal feelings about the suit are not important, but it is not a personal suit against me, of course. It's one to test the authority of

the demostic [sic] referee and the authority to even have him appointed.

Anything else for the record?

MR. MILLICAN: No, sir, Your Honor.

MR. GARMON: No, sir.

[R-10] THE COURT: All right.

Okay, I am cognizant, of course, of the canon of ethics which indicate that a judge should not be involved in a matter where there may create an appearance of partiality. But the appellant [sic] courts have ruled that there must be some showing, some basis of bias or prejudice on the part of the judge hearing the case of some kind. As I point out, this is not a suit, personal suit, it's a suit where the issue is whether or not this court referee and authority to do what has been done in the past. I have made no public pronouncement of how I feel about it one way or the other. Of course, the suit is being defended as it must be defended in order to get some sort of adjudication as to the merits of it. And I have been named as a defendant in the case along with the other Circuit Judges.

But, now, I find nothing here in this hearing that indicates that there is any basis for me to recuse, and I'm going to deny the motion to recuse.

This does need to be set down for some hearing by proper motion of either party.

MR. MILLICAN: Your Honor, I [R-11] believe I had filed a motion to that effect, and you were holding it

on your desk or at your leisure until this particular hearing could be resolved, and you would at that time set it. I believe I sent one over sometime a week or so ago.

THE COURT: May very well have been. I will search my desk.

MR. MILLICAN: All right, sir.

MR. GARNON: Thank you, Judge.

THE COURT: Thank you all.

MR. MILLICAN: Thank you, Your Honor.

END OF PROCEEDINGS

[R-12] CERTIFICATE

STATE OF ALABAMA:

COUNTY OF ETOWAH:

I, Doyle May, Official Court Reporter of the Sixteenth Judicial Circuit of Alabama, hereby certify that I reported the above and foregoing proceedings in stenotype, and that the same has been by me or under my supervision and control correctly transcribed.

Done this the 18th day of May, 1989.

/s/ Doyle May
Doyle May
Official Court Reporter
Sixteenth Judicial Circuit
of Alabama
Gadsden, Alabama

[SEAL]

ALABAMA STATE BAR
THE DISCIPLINARY COMMISSION
TELEPHONE 205-269-1515
1019 SOUTH PERRY STREET
MONTGOMERY, ALABAMA 36104

January 8, 1992

Mr. Milford Leon Garmon
Attorney at Law
945 Forrest Avenue
Gadsden, AL 35901

Re: Pending Complaints

Dear Mr. Garmon:

Pursuant to our meeting of December 17, 1991 at your law offices, and your request that I consider the possibility of settlement of some or all of the charges presently pending against you, I provide the following information:

1. ASB 89-81 – The violations alleged, if established by the evidence at a hearing thereon, would appear to justify a suspension. However, as in each case, any mitigating circumstances could reduce this to a public reprimand with general publication.

2. ASB 89-99(A) – The factual allegations and specific disciplinary rules alleged to have been violated in this case appear to justify, if proved at a hearing, a public reprimand without general publication.

3. ASB 89-99(A) – Likewise, this case would appear to justify, on its alleged facts and specified disciplinary rules violations, a public reprimand.

4. ASB 89-671(B) – The alleged disrespect shown for the client in this matter would appear to justify a private reprimand.

5. ASB 90-424 – Since this matter was initially recommended as a private reprimand, I would stand by that recommendation and allow this case to be disposed of for that stated discipline.

6. ASB 89-148 – Coupled with 90-601(B), which alleges basically the same substantive violations, i.e., allowing Allsup to engage in, and possibly assisting him in the unauthorized practice of law, would appear to justify a definite term of suspension.

7. ASB 90-575 and 90-758 – The claims of the filing of frivolous counter-claims, and the conflict of interest questioned by the judge in the bankruptcy matter appear to justify, on the alleged facts and alleged rules violations, a germ of definite suspension.

8. ASB 90-527 and 90-775 – This continued battle with Judge Swann, the alleged disrespect for the court and alleged bad faith pleading would likewise appear to justify a term of definite suspension.

9. ASB 89-409 – The allegations appear to justify a public reprimand with general publication for attempting to perpetrate a fraud on the tribunal.

10. ASB 89-173 – Private reprimand.

11. ASB 89-321 and 90-900 – The continuation of your ongoing dispute with Ken Robertson is, as I have stated to you earlier, an obvious concern of the Bar. In ASB 89-321, you stated that I should consider that case as part and parcel of ASB 90-632 and that the same discipline be imposed. However, I disagree with your assessment that one reprimand (private) should be administered for all the letters you wrote, as I feel each should be considered a separate violation of the rules. However, I would be willing to recommend a separate private reprimand in ASB 89-321 consistent with that which I have previously recommended you receive on your request for reconsideration in ASB 90-632. In ASB 90-900, I would likewise recommend a private reprimand.

Based on the conversation we had at your office on December 17, 1991, to the effect that you would obviously not agree to any form of suspension, it does not appear that those cases wherein I think suspension would be appropriate discipline if you were found guilty of the facts and rules violations alleged in those respective cases, I would prefer that you write to me informing me as to your assessment of each of these cases and as to any conditional guilty plea which you would be willing to submit at this time.

Please let me hear from you in this regard within the next ten days. As we discussed earlier, in the event some of these cases can be disposed of in the form of conditional guilty pleas, now would be the time to proceed in that regard. Once I have received your thoughts as to any possible settlement of any of these cases, I will then assess the entire package of charges and pending complaints once again to see if any of these can be disposed

of. If any are disposed of, I will then review the remaining case files to inform you as to the witnesses I would expect to call in each of those remaining respective cases.

Also, per your request, please find enclosed a copy of the response which you filed in ASB 90-424. It was my understanding from you and your law clerk, Mike Allsup, that you could not locate nor determine whether such a response had been filed. Our records disclosed that such a response was filed, in addition to other pleadings, with copies of all such pleadings filed by you in that package enclosed for your file. I have also attempted to find out the name of Ken Robertson's brother-in-law and his address. It is my understanding that his name is Wiley Mears, and his address is 300 Doris Mill Road, Carrollton, GA 30117.

I would also reiterate the Bar's position that we will be willing to await the Supreme Court's decision in your quo warranto proceeding as it impacts several of the cases which are presently pending against you in this office. However, I would still appreciate your assessing each of these cases assuming that the court again decides against you on this issue so that when the ruling by that court is made the cases will be in a posture to proceed forthwith.

Finally, concerning ASB 89-341, I have written Ms. Bearden inquiring as to whether her mother's house ever sold, and whether the estate has been concluded. Once I

receive any response from her, I will likewise pass that information along to you.

Sincerely,

/s/ J. Anthony McLain
J. Anthony McLain
Assistant General Counsel

JAM/bm

Enclosure

IN THE SUPREME COURT OF ALABAMA
August 23, 1994

In the Matter of Gary C. Huckaby, Attorney at Law	Disciplinary Board of The Alabama State Bar, Panel IV, Pet #94-002

ORDER

WHEREAS, the order of the Disciplinary Commission of the Alabama State Bar accepting the conditional guilty plea of Gary C. Huckaby was duly filed in this Court on August 15, 1994,

NOW, THEREFORE, IT IS ORDERED by the Supreme Court of Alabama, that Gary C. Huckaby, be, and he is hereby, suspended from the practice of law in the State of Alabama for a period of forty-five (45) days, said suspension to become effective September 3, 1994.

Hornsby, C. J., and Maddox, Almon, Shores, Houston, Steagall, Kennedy, and Ingram, JJ., concur.

Gadsden Times, Tuesday, April 7, 1992 – B3

Lawyer pleads guilty to tax charge

ASSOCIATED PRESS

BIRMINGHAM – Former state bar association president Gary Huckaby was sentenced to two months of home detention and fined $20,000 for failing to file federal income tax returns for 1988, when he led the lawyers' organization.

Huckaby, 53, a partner in the Huntsville office of the Birmingham law firm Bradley, Arant, Rose & White, also was ordered to serve two years on probation.

U.S. District Judge Sam C. Pointer imposed the sentence following Huckaby's guilty plea Friday to the misdemeanor charge under an agreement with prosecutors. Huckaby acknowledged to the court that his income exceeded $200,000 in 1988 and he knowingly failed to file his tax return by the April 15, 1989 deadline.

Federal prosecutors said Huckaby paid his 1988 taxes on Oct. 15, 1991, and that he filed returns and paid delinquent taxes for the tax years 1985 through 1987 in December 1989. His total payment for back taxes, plus penalties and interest for the four years was more illegible tant U.S. Attorney Michael Whisonant.

Huckaby, who declined comment, was president of the Alabama State Bar in 1988-89.

Reggie Hamner, the executive director of the association in Montgomery, said Monday he could not comment on whether or not the bar would review the misdemeanor tax case for possible disciplinary action. The bar has

authority to discipline attorneys who violated codes of conduct, subject to Alabama Supreme Court review.

Internal Revenue Service officials said Huckaby paid his back taxes only after the IRS began investigating.

Drew Redden, an attorney for Huckaby, told the court prior to sentencing that the government has suffered no tax loss. "What has been paid is more that the tax that would have been due," he said.

UNITED STATES DISTRICT COURT
Northern District of Alabama

UNITED STATES OF AMERICA

v.

GARY CARLTON HUCKABY
Defendant.

Case Number CR 92-P-39-NE

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
(Filed Apr. 13, 1992)

The defendant, GARY CARLTON HUCKABY, was represented by Drew Redden.

The defendant pleaded guilty to count(s) 1. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
26 USC 7203	Failure to File Income Tax Return	08/15/89	1

As pronounced on 04/03/92, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the Clerk, U.S. District Court a special assessment of $25.00, for count(s) 1, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 3rd day of April, 1992.

/s/ Sam C. Pointer
United States District Judge

PROBATION

The defendant is hereby placed on probation for a term of 2 year(s).

While on probation, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If this judgment imposes a fine, special assessment, costs or restitution obligation, it shall be a condition of probation that the defendant pay any such fine, assessment, costs and restitution.
2. The defendant shall not own or possess a firearm or destructive device.
3) The defendant shall serve two months at home detention which may include electronic monitoring as deemed necessary by the U.S. Probation Office.

STANDARD CONDITIONS OF PROBATION

While the defendant is on probation pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer within seveny-two hours of any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $20,000.00.

This fine (plus any interest required) shall be paid at the rate of $833.00 per month for 23 months and $841 for the 24th month, unless modified by the U.S. Probation Office for good cause shown.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	10
Criminal History Category:	I
Imprisonment Range:	6 months to 12 months
Supervised Release Range:	1 year
Fine Range:	$2,000 to $20,000
Restitution:	$0

The Court departs from the Guidelines as they relate to the imprisonment range because there are circumstances in this case not contemplated by the Guidelines. Specifically, the filing of returns and payment of taxes result in a higher offense level than if the returns had not been filed and the defendant had been denied the reduction for acceptance of responsibility. For purposes of the imprisonment range (but not for the fine range) the Court finds that the offense level should be treated as 8, which produces an imprisonment range of 2 to 8 months.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA)
)
VS.)
)
GARY C. HUCKABY)

PLEA AGREEMENT

(Filed Apr. 2, 1992)

The United States of America (hereinafter, "Government") and Gary C. Huckaby (hereinafter, "defendant") hereby agree to the following terms and understandings:

1. The defendant agrees to plead guilty to a ONE COUNT INFORMATION which charges the defendant with violating Title 26, United States Code, Section 7203 (Willful failure to file return, supply information or pay tax for the tax year 1988).

2. By pleading guilty to this charge, the defendant could receive a MAXIMUM SENTENCE of ONE YEAR INCARCERATION AND/OR A FINE OF $100,000.

3. The Government agrees, pursuant to Federal Rule of Criminal Procedure, 11 (e)(1)(B), that it will not oppose the defendant's request for either a sentence of probation or a period of home detention pursuant to Section 5C1.1(c)(2) of the *Federal Sentencing Guidelines Manual*, should the Court deem such a punishment appropriate under the Sentencing Guidelines. The government will recommend and the defendant agrees to pay a fine of fifty thousand dollars ($50,000.00).

4. The Government stipulates that the defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his conduct.

5. The Government and the defendant further agree and stipulate to the following terms and understandings:

a. All taxes, penalties and interest due and owing to the Internal Revenue Service for the tax years 1985, 1986, 1987 and 1988 have been paid.

b. The following charges shall NOT be brought against the defendant: Any violation of Title 26, United States Code, §7201 and/or 7206 for 1988 or any earlier year; any violation of Title 26, United States Code §7203 for any earlier tax year other than 1988.

c. Because it is the Court's duty to impose sentence upon the defendant, any sentence either recommended or stipulated to herein IS NOT BINDING UPON THE COURT, and the Court need not accept the recommendation, but may instead sentence the defendant as outlined in Paragraph 2. In the event the Court does not accept the Government's recommendation, the defendant fully understands that he may not unilaterally withdraw his plea.

d. Unless this plea is rejected by the Court or otherwise withdrawn, the defendant hereby waives and gives up any and all motions, defenses, objections, or requests which he has made or raised, or could assert hereafter, to the Court's entry of judgment against him and imposition of sentence upon him consistent with this Agreement. The defendant further waives and gives up the right to

appeal or collateral attack based upon any of the above stated provisions.

6. The Government stipulates that with regard to sentencing by the Court the defendant may argue:

a. There is no "tax loss" to the Government;

b. Two of the tax years in question should not be considered in determining an offense level under the United States sentencing Guidelines;

c. The "alternative measure" of tax loss provided by U.S.S.G. §2TI.1 should be employed; and

d. mitigating circumstances and conduct exist which permit the Court to depart from the guidelines-specified sentence.

The defendant agrees and understands that the Government will argue contrary to the defendant's position as stated in paragraphs 6 (a)-(c) herein, and that with regard to paragraph 6 (d), the Government reserves the right to full allocution on the facts, including correcting any perceived misstatements of fact or to provide additional factual information in order that the Court will have a complete understanding of the facts. Additionally, the Government reserves the right to rebut any argument as to whether sufficient grounds exist for a downward departure under the Sentencing Guidelines.

Defendant's Understanding

I have read and understand the provisions of this Agreement. I have discussed the case and my constitutional and other rights with my lawyer. I am satisfied

with my lawyer's representation in this case. I understand that by pleading guilty, I will be waiving and giving up my right to continue to plead not guilty, to a trial by jury, to the assistance of counsel at that trial, to confront, cross-examine, or compel the attendance of witnesses, to present evidence in my behalf, my privilege against self-incrimination, and the presumption of innocence. I agree to enter my plea as indicated above on the terms and conditions set forth herein. NO OTHER PROMISES OR REPRESENTATIONS HAVE BEEN MADE TO ME BY THE PROSECUTOR, OR BY ANYONE ELSE, NOR HAVE ANY THREATS BEEN MADE OR FORCE USED TO INDUCE ME TO PLEAD GUILTY. I further state that I have not had any drugs, medication, or alcohol within the past 48 hours.

I understand that the Government may withdraw its consent to this Agreement at any time prior to its acceptance in writing by me as evidenced by my signature on this Plea Agreement and its delivery to the prosecuting attorney even though I may not personally have received notice of the withdrawal of consent by the Government.

I have personally and voluntarily placed my initials on every page of this Agreement and have signed the signature line below to indicate that I have read and approved all of the previous paragraphs of this Agreement, and understand all of the provisions of this Agreement, both individually and as a total binding Agreement.

1-10-92
Date

/s/ Gary C. Huckaby
Gary C. Huckaby, Defendant

-

Counsel's Understanding

I have discussed this case with my client in detail and have advised him of his rights and all possible defenses. My client has conveyed to me that he understands this Agreement and consents to all its terms. I believe the plea and disposition set forth herein are appropriate under the facts of this case and are in accord with my best judgment. I concur in the entry of the plea as indicated above and on the terms and conditions set forth herein.

1-16-92
Date

/s/ L. Drew Redden by illegible
L. Drew Redden
Counsel for Defendant

I have reviewed this matter and concur that the plea and disposition set forth herein are appropriate and are in the interest of justice.

2/28/92
Date

/s/ Frank Donaldson
FRANK W. DONALDSON
United States Attorney
Northern District of
Alabama

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	)	CR. NO.
	)	CR92-P-039-NE
v.	)	
GARY C. HUCKABY	)	
DEFENDANT.	)	

WAIVER
(Filed Apr. 3, 1992)

Pursuant to the provisions of 18 U.S.C. Section 3552(d), I, the defendant in the above-styled cause, hereby WAIVE the requirement that the presentence investigation report prepared in my case be disclosed to me at least ten (10) days prior to sentencing. I understand the Court will read and review the presentence report even though it has not been disclosed to me at least ten (10) days before sentencing.

4/3/92
DATE

/s/ Gary C. Huckaby
DEFENDANT

4/3/92
DATE

/s/ Drew Redden
DEFENSE COUNSEL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

APPEARANCE BOND

UNITED STATES OF AMERICA	CASE NUMBER CR92-P-039-NE
vs.	
GARY CARLTON HUCKABY	(Filed Feb. 21, 1992)

Non-surety: I, the undersigned defendant acknowledge that I and my personal representatives, jointly and severally, are bound to pay to the United States of America the sum of $500.00.

The conditions of this bond are that the defendant, GARY CARLTON HUCKABY, is to appear before this court and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in this case, including appearance for violation of a condition of defendant's release as may be ordered or notified by this court or any other United States District Court to which the defendant may be held to answer or the cause transferred. The defendant is to abide by any judgment entered in such matter by surrendering to serve any sentence imposed and obeying any order or direction in connection with such judgment.

It is agreed and understood that this is a continuing bond (including any proceeding on appeal or review) which shall continue until such time as the undersigned are exonerated.

If the defendant appears as ordered or notified and otherwise obeys and performed the foregoing conditions

of this bond, then this bond is to be void, but if the defendant fails to obey or perform any of these conditions, payment of the amount of this bond shall be due forthwith. Forfeiture of this bond for any breach of its conditions may be declared by any United States District Court having cognizance of the above entitled matter at the time of such breach and if the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in such United States District Court against each debtor jointly and severally for the amount above stated, together with interest and costs, and execution may be issued any payment secured as provided by the Federal Rules of Criminal Procedure and any other laws of the United States.

This bond is signed on February 21, 1992 at Birmingham, Alabama.

/s/ Gary C. Huckaby
GARY CARLTON HUCKABY
701 Greene St., Huntsville, AL 358
MAILING ADDRESS, CITY, STATE, ZIP & PHONE

Signed and acknowledged before me on February 21, 1992.

/s/ T. Michael Putnam
T. MICHAEL PUTNAM, U. S. MAGISTRATE JUDGE

Approved: /s/ T. Michael Putnam
T. MICHAEL PUTNAM, U.S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

ACKNOWLEDGEMENT OF DEFENDANT

CASE NUMBER CR92-P-039-NE

I acknowledge that I am aware of the conditions of release set forth in the General Order Setting Condition of Release dated September 10, 1990. I promise to obey all conditions of release, to appear as directed, and to surrender for service of any sentence imposed. I further acknowledge that I have received a copy of the General Order Setting Conditions of Release dated September 10, 1990.

FEBRUARY 21, 1992

/s/ Gary C. Huckaby
GARY CARLTON HUCKABY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

TRIAL NOTICE

NAME OF DEFENDANT GARY CARLTON HUCKABY
CASE NUMBER CR92-P-039-NE

NOTICE TO DEFENDANT:

You are hereby notified that your case will be set for trial on a TRIAL DOCKET which commences on Monday, April 6, 1992 before UNITED STATES DISTRICT JUDGE SAM C. POINTER, JR.

You are directed to be present Monday, April 6, 1992 in Birmingham, Alabama at the aforesaid time ready for trial, in Courtroom 8.

YOU WILL RECEIVE NO FURTHER NOTICE

NOTE: Judge Pointer will conduct a CONSENT DOCKET to receive plea changes on Friday, March 20, 1992.

NOTICE

IF THE INDICTMENT/INFORMATION CHARGES YOU WITH ANY OFFENSE THAT OCCURRED ON OR AFTER NOVEMBER 1, 1987, THE FOLLOWING SCHEDULE APPLIES TO YOUR CASE.

1. All Rule 16 discovery requests must be filed Thursday, February 27, 1992.
2. All other pretrial motions must be filed by Thursday, February 27, 1992. No motions filed after that date will be considered unless filed with leave of court.
3. Probation Office conferences will be conducted on Tuesday, February 25, 1992. You will receive further notice of the specific time for the conference in your case. Attendance at the conference is *MANDATORY*.

IF THE INDICTMENT/INFORMATION CHARGES YOU WITH ONLY OFFENSES THAT OCCURRED BEFORE NOVEMBER 1, 1987, THE FOLLOWING SCHEDULE APPLIES TO YOUR CASE:

Pretrial Conferences are to be held Friday, February 28, 1992. All pretrial motions *MUST BE*

FILED IN THE CLERK'S OFFICE no later than Thursday, February 27, 1992. No motion filed after that time will be considered unless filed with the permission of the Court.

PERRY D. MATHIS, CLERK

BY: CHERYLE P. BROWN-LEE, DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	)	CASE NUMBER
	)	CR 92-P-039-NE
v.	)	
GARY CARLTON HUCKABY	)	

NOTICE OF ARRAIGNMENT

TAKE NOTICE that the above-entitled case has been set for **ARRAIGNMENT** at HUGO L. BLACK U.S. COURTHOUSE, 1729 5th Avenue North, Birmingham, Alabama, on **Thursday, February 20, 1992, at 9:30 a.m. before U.S. Magistrate T. Michael Putnam** to answer any charges against you as described in the attached indictment or information.

PERRY D. MATHIS, Clerk

By: /s/ Marthalene Brown
Deputy Clerk

DATE: February 11, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

UNITED STATES OF AMERICA CR 92-P-039-NE

V.

GARY CARLTON HUCKABY

INFORMATION

(Filed Feb. 11, 1992)

COUNT ONE: (26 USC 7203)

The United States Attorney charges:

That during the calendar year 1988, the Defendant,

GARY CARLTON HUCKABY

who was a resident of Huntsville, Alabama, had and received a gross income of $ 208,481.00; that by reason of such income he was required by law, following the close of the calendar year 1988 and on or before August 15, 1989, to make an income tax return to the District Director of Internal Revenue, at Birmingham, Alabama, or other proper officer of the United States, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said district Director of Internal Revenue, or to any other proper

officer of the United States, in violation of Title 26, United States Code, Section 7203.

FRANK W. DONALDSON
UNITED STATES ATTORNEY
/s/ Herbert H. Henry III
HERBERT H. HENRY III
ASSISTANT UNITED STATES
ATTORNEY

HUNTSVILLE ATTORNEY SUSPENDED

Huntsville attorney Gary C. Huckaby has been suspended from the practice of law for a period of 45 days by the Disciplinary Board of the Alabama State Bar. Mr. Huckaby's suspension became effective September 3, 1994. This action was a result of Mr. Huckaby having pled guilty in the United States District Court for the Northern District of Alabama to the criminal misdemeanor of failing to file an income tax return for the calendar year 1988.

Disciplinary Board

Alabama State Bar

September 8, 1994

HUNTSVILLE LAWYER REPRIMANDED

Huntsville attorney, Barbara C. Miller, was publicly reprimanded by the Alabama State Bar on May 21, 1993, for her past failure to comply with certain rules relating to advertising by lawyers in the State of Alabama.

Disciplinary Commission
State of Alabama